Center Construction Company, Inc. d/b/a Center Service System Division *and* Local 370, United Association of Journeyman and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO. Cases 7–CA–46490, 7–CA–46696, and 7–CA–46697

August 27, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September, 21, 2004, Administrative Law Judge Joseph Gontram issued the attached decision. The General Counsel and the Respondent filed exceptions and supporting briefs. The General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] as modified and to adopt the recommended Order as modified below.[3]

The judge found that the Respondent committed several unfair labor practices. We unanimously agree with the judge that the Respondent violated Section 8(a)(1) by threatening employees for honoring a picket line,[4] surveilling picket line activity, interrogating applicant David Lawrence during a job interview,[5] promulgating and enforcing an unlawful rule prohibiting employees from wearing clothing displaying the Union's insignia and interrogating employees about their union sympathies. Likewise, we unanimously agree with the judge that the Respondent violated Section 8(a)(1) and (3) by refusing to consider and hire union members for available plumber positions, and by discharging employee Wayne Rose.[6] We further agree with the judge's recommendation that the Respondent be ordered to bargain with the Union pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). As set forth below, a majority of the Board[7] agrees with the judge that the Respondent violated Section 8(a)(1) by soliciting grievances from Rose. A separate majority[8] reverses the judge's finding that the Respondent violated Section 8(a)(1) by threatening adverse employment actions, including termination, if the Union was selected to represent the plumbers.

Solicitation of Grievances

Members Liebman and Schaumber agree with the judge that the Respondent violated Section 8(a)(1) by soliciting grievances from employee Wayne Rose and impliedly promising to remedy them. In August 2003,

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] There are no exceptions to the judge's dismissal of the complaint allegation that the Respondent, by its president and owner, Robert Eagleson, violated Sec. 8(a)(1) by telling employee Wayne Rose that following prior unsuccessful union organizing drives, he "eventually got rid of the [useless] sons of bitches." Chairman Battista and Member Schaumber find it unnecessary to rely on this statement as evidence of antiunion animus. Member Liebman, however, does rely on the statement for this purpose.

[3] The order is modified to clarify the Respondent's remedial obligations for its unlawful refusal to consider or hire the discriminatees. See *Tri-County Paving, Inc.*, 342 NLRB No. 122, slip. op. at 1 (2004).

[4] In finding that the Respondent violated Sec. 8(a)(1) by threatening employees with discipline for honoring a picket line, Chairman Battista and Member Schaumber do not rely upon the judge's finding that the Respondent threatened its employees by directing them to return all company property to work on August 7, 2003. In this same context, Member Liebman does not rely on the judge's alternative balancing analysis in the penultimate paragraph of sec. III,A,2 of the judge's decision.

[5] In finding that the Respondent violated Sec. 8(a)(1) by coercively interrogating applicant David Lawrence during a job interview, Chairman Battista and Member Schaumber agree that the questioning was coercive considering all relevant circumstances. They find it unnecessary to pass on the judge's finding that the questioning was inherently coercive.

[6] Member Schaumber points out that under the Board's *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), analysis the General Counsel must prove by a preponderance of the evidence that antiunion animus (i.e., Sec. 7 animus) was a substantial or motivating factor in an employer's adverse employment action. It was with this understanding that the Supreme Court approved *Wright Line* as "at least permissible" under the Act. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983) ("As we understand the Board's decisions, they have consistently held that the unfair labor practice consists of a discharge or other adverse action that is based in whole or in part on anti-union animus—or as the Board now puts it, that the employee's protected conduct was a substantial or motivating factor in the adverse action. The General Counsel has the burden of proving these elements under Section 10 (c)." 462 U.S. at 399. Consistent therewith, the Board, administrative law judges, and circuit courts of appeals have sometimes specifically delineated as a fourth element of the General Counsel's initial burden of proof under *Wright Line* proof of a causal nexus. A causal nexus is also required under the Board's *FES*, 331 NLRB 9 (2000), analyses, which applies a similar causation test. The judge in this case did not identify proof of a causal nexus as a separate element of the General Counsel's case either under *Wright Line* or *FES*. While Member Schaumber agrees with the judge's findings and conclusions, he believes identifying causal nexus as a separate element under *Wright Line* and *FES* is preferable lest the burden of proof on this issue be misplaced.

[7] Members Liebman and Schaumber.

[8] Chairman Battista and Member Schaumber.

shortly after the union organizing drive commenced, Supervisor Matt Welsh told employee Wayne Rose on a payday that he had to pick up his paycheck from the Respondent's president and owner, Robert Eagleson. Rose complied, and during the ensuing meeting, which lasted about 45 minutes, Eagleson spoke about the history of the Company and Local 370's organizing efforts, telling Rose that prior union organizing efforts had been unsuccessful, and that "he eventually got rid of the [useless] sons of bitches." Rose then asked if Eagleson considered him useless, and Eagleson replied, "No, I hear you're a good one."[9]

Eagleson also asked Rose if he had any questions or concerns about his job. Rose, whose testimony was generally credited by the judge, additionally testified that he told Eagleson that he was not receiving health insurance. Eagleson responded that it was a big company "and sometimes things fall through the cracks." Rose testified that, as he left the office, Eagleson told him, "If you have any problems with this company, I'm the president . . . you need to discuss these with me."

The meeting was unusual, because Rose had never been instructed to pick up his paycheck directly from the company president, and had not previously spoken to Eagleson or attended a meeting in his office. Indeed, prior to the Union's organizing drive, the Respondent required unrepresented employees to first approach their immediate supervisor with grievances, which were not to be presented to Eagleson unless their immediate supervisor failed to resolve them.

The Board has long held that, in the absence of a previous practice of doing so, the solicitation of grievances by an employer during an organizational campaign violates the Act when the employer promises to remedy those grievances. See, e.g., *Uarco, Inc.*, 216 NLRB 1, 2 (1974). The solicitation of grievances alone is not unlawful, but it raises an inference that the employer is promising to remedy the grievances. This inference is particularly compelling when, during a union organizational campaign, an employer that has not previously had a practice of soliciting employee grievances institutes such a practice. *Amptech, Inc.*, 342 NLRB No. 117, slip op. at 6–8 (2004). While an employer who has had a past practice and policy of soliciting grievances may continue to do so during an organizational campaign, an employer cannot rely on past practice if it "significantly alters its past manner and methods of solicitation during the campaign." *House of Raeford Farms*, 308 NLRB 568, 569 (1992), enfd. mem. 7 F.3d 223 (4th Cir. 1993), cert. denied 511 U.S. 1030 (1994).

Applying these principles, we find, in agreement with the judge, that Eagleson, by directing that Rose bring grievances directly to him, solicited grievances from Rose and impliedly promised to remedy them. The directive and the manner in which it was conveyed represented a significant change from the Respondent's prior policy requiring employees to first present grievances to their immediate supervisor. *House of Raeford Farms*, supra, 308 NLRB at 569 (requirement that employees attend frequent grievance meetings was significant change from preorganizing campaign policy of holding infrequent meetings at which attendance was voluntary). The significance of the change is highlighted by the fact that Eagleson had never spoken with Rose prior to the solicitation of grievances at issue here, much less discussed grievances with him. At the mid-August meeting, in contrast, Eagleson asked Rose if he had any questions or concerns about his job and responded to Rose's complaint about not receiving health insurance by telling him that he should receive it. In these circumstances, we agree with the judge that the Respondent violated Section 8(a)(1) by soliciting grievances and impliedly promising to remedy them. See also *Avondale Industries*, 329 NLRB 1064, 1101–1102 (1999) (superintendent unlawfully solicited grievances by telling employees to advise their supervisor of safety problems and come to him if supervisors did not take action and that he was there to solve problems).

The dissent relies on Eagleson's version of the August meeting, which was generally discredited by the judge, in arguing that Eagleson's comment was not unlawful. In doing so, the dissent focuses on each aspect of the August meeting in isolation. For example, the dissent correctly observes that it would not have been unlawful, without more, for Eagleson to meet one-on-one with an employee or to remind employees that he was the ultimate authority.[10] This is particularly true if such conduct was the norm prior to any organizing activity. Here,

[9] Eagleson did not deny making this remark. Instead, he testified that he was not sure whether or not he had asked Rose about his interest in the Plumbers Union. Eagleson's testimony about the August meeting was generally discredited by the judge.

[10] In support for this latter proposition, the dissent cites *Suburban Journals of Greater St. Louis*, 343 NLRB No. 24 (2004). There, the Board found that the employer did not engage in objectionable conduct by holding one on one meetings with unit employees during which benefits for represented and unrepresented employees were compared. In the circumstances of that case, the Board found that the comparison did not amount to a promise that the represented employees would receive improved benefits if they voted to decertify the union. The case is inapposite as the issue here is whether Eagleson solicited grievances and impliedly promised to remedy them during the August meeting. Member Liebman did not participate in *Suburban Journals of Greater St. Louis*, supra, and she expresses no view here as to whether it was correctly decided. She agrees with Member Schaumber nonetheless that it is inapposite here.

however, Rose had never met with or discussed workplace concerns with Eagleson. Then, shortly after the commencement of the campaign, he was directed to the company president's office to retrieve his paycheck, an unprecedented event; engaged in a 45-minute conversation with the Company's highest executive, with whom he had never before spoken; was questioned about his workplace concerns; and was told that he should be receiving the insurance benefits about which he complained. Eagleson told Rose that if Rose had any problems "you need to discuss these with me." In these circumstances, we are satisfied that Eagleson's directive represented a significant change in existing practice.[11]

Alleged Threat of Adverse Employment Actions

Contrary to the judge, Chairman Battista and Member Schaumber find that the Respondent did not violate Section 8(a)(1) when Eagleson told Patrick Ruddy, the Sheet Metal Workers union's steward, "If we let the Plumbers come in here, it is going to take three or four of your men's positions. Who would [you] like to get rid of here?" The judge found the violation applying the standard enunciated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), for deciding whether an employer's statement represents an unlawful threat of reprisal or represents a lawful prediction of the consequences of unionization . . . carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." Here, Eagleson's statement to the Sheet Metal Workers union shop steward represented his understanding of the collective-bargaining agreement that the Plumbers Union wanted the Respondent to sign. In expressing his opinion, he repeatedly quoted from the agreement and made it clear that he was relying upon the language of the proposed agreement as the basis for his opinion.

Furthermore, Eagleson's statements did not contain any threat of reprisal by the Respondent. He did not state that the Respondent itself would take any unilateral action to eliminate jobs but pointed out what he believed the Plumbers Union would seek to do. See, e.g., *Hampton Inn*, 309 NLRB 942, 943 (1992). Moreover, the Respondent and the Sheet Metal Workers Union have had a collective-bargaining relationship for over 20 years. In that context, Eagleson's opinion could not have been reasonably understood as implicitly threatening that the Respondent would eliminate any jobs solely on its own initiative. Indeed, it is clear that Ruddy did not understand them as a threat but merely Eagleson's opinion. Accordingly, we shall dismiss this 8(a)(1) allegation.

Our dissenting colleague contends that Eagleson's statements to Ruddy fail to meet either part of the *Gissel* standard for a lawful prediction. She says that the Respondent did not offer objective evidence justifying its "prediction," nor did it show that the probable consequences were beyond its control. We disagree.

The Board has frequently quoted the language of *Gissel* describing what an employer may lawfully say about the consequences of unionization:

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization (citation omitted). [*NLRB v. Gissel Packing Co.*, 395 U.S. at 618.]

This language is followed by sentences which are particularly apt in the instant case:

> If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. Id.

Thus, under *Gissel*, a prediction constitutes an unlawful threat of retaliation "*if*" the employer says or implies that it may take action at his own initiative. If the action is to be solely at the employer's initiative, the prediction is no longer reasonably based on "available facts."

Contrary to our colleague's contention, the Respondent made it clear that it would be acting in response to a Plumbers Union's initiative if it eliminated Sheet Metal Workers' jobs. And, the Respondent did offer objective evidence based on available facts for its opinion that the Plumbers would seek Sheet Metal Workers' jobs if suc-

[11] Contrary to our dissenting colleague's implication, we have not found that Eagleson's statement to Rose that he should be receiving health insurance was independently an unlawful promise of benefits. Instead, we rely on the solicitation of grievances which preceded and elicited Rose's complaint about health insurance, in addition to the other evidence cited above, in finding this violation.

We give no weight to Eagleson's testimony, cited by the dissent, that he told Rose to see the Respondent's office manager about his health insurance. As discussed above, that testimony was not credited by the judge, who generally did not credit Eagleson's testimony concerning the August meeting.

cessful in organizing the Respondent's plumbers.[12] As Ruddy testified, Eagleson read parts of the Plumbers Union's contract to him, "explaining what he thought it meant."[13] Ruddy agreed that Eagleson offered him the contract to look at and urged him to read it so that he could see for himself what it said. Ruddy described a second meeting as a "redo of the same things" with Eagleson, again opining about "what the [Plumbers] contract meant to him [Eagleson]" and "trying to impress on me the point that the Plumbers were going to take our jobs." In sum, the Respondent made a "reasonable prediction" about the potential for the Plumbers Union to claim jobs, "based on available facts." See *Crown Cork & Seal Co.*, 36 F. 3d 1130, 1141 (D.C. Cir. 1994).

Our dissenting colleague further contends that our decision is contrary to the Board's decisions in *Systems West LLC*, 342 NLRB No. 82 (2004), and *Schaumberg Hyundai, Inc.*, 318 NLRB 449 (1995). We disagree.

In *Systems West LLC*, supra, the employer told employees that if they unionized they would not be able to work outside the Yakima, Washington area because the employer "couldn't foresee paying the extra cost to take them to a jobsite out of the area when I could hire people locally and not have to pay the extra cost." The Board found that this statement was unlawful because it was not based on objective fact. Rather, the basis for the prediction was an incorrect assumption that local unions in other areas would want their own members working on local projects. A second statement predicted that the employees would not qualify as journeymen and that the employer would find it hard to justify paying them journeyman's wages when more experienced workers could be obtained from the hiring hall. Again, the employer offered no evidence to the listening employees justifying these predictions. The Board also found that both statements predicted adverse consequences which, on their face, indicated that the employer would of its own volition inflict adverse consequences on its employees if they chose union representation.

For the first time at the hearing, the employer sought to justify the statements based on provisions of a master labor agreement introduced into evidence at the hearing, which obligated signatory employers to first employ individuals dispatched from union hiring halls. The Board rejected the employer's defense for a number of reasons that distinguish that case from the present one. First, the master labor agreement was a post hoc justification. The employer neither informed his listeners nor testified at the hearing that the statements were based on the terms of the agreement. In contrast, Eagleson repeatedly sought to justify and explain his position based on the proposed Plumbers Union's contract, quoted it, referred to it, and offered to let Ruddy read it for himself. Second, the master labor agreement was an expired agreement for an adjacent territory that did not apply to the area where the employer operated. Eagleson, on the other hand, relied on provisions of a proposed agreement presented to the Respondent by the Plumbers Union for the Respondent to sign.

Our dissenting colleague notes that the Board in *Systems West LLC*, supra, additionally found no merit in the employer's reliance on the expired master labor agreement because it "ignored the reality that such provisions are neither inevitable nor immutable, but are merely terms that *may* result from collective bargaining, and, thus, are at least partly within the [employer's] control." 342 NLRB No. 82, slip op. at 2 (emphasis in original). This statement has no application here because the employer in *Systems West LLC* did not rely on the expired master labor agreement as a basis for its predictions which, on their face, stated that the employer would impose adverse consequences of its own volition. The Respondent here, having been presented with a proposed agreement by the Plumbers, had every right to make predictions, based on objective fact, concerning the consequences adoption of that agreement would have on employees represented by the Sheet Metal Workers. To hold otherwise would effectively impose a blanket gag rule prohibiting any comment by an employer on the consequences of agreements proposed to it. This we decline to do.[14]

Schaumburg Hyundai, Inc., supra, is also distinguishable. There, the Board found that the employer failed to provide objective evidence that its employees would suffer more onerous working conditions if they were cov-

[12] Our dissenting colleague argues that the record contains nothing about the substance of Eagleson's explanations. Ruddy, however, specifically testified that Eagleson read from the Plumbers Union's contract and offered his opinion based upon that reading. Logically, it follows that the substance of Eagleson's explanation was the text of the contract and his interpretation thereof.

[13] Our colleague asserts that Eagleson never acknowledged meeting with Ruddy. We fail to see the import of this assertion since he was never asked about a meeting with Ruddy nor did he ever deny meeting with him. She also asserts that he denied saying anything to anyone about a reduction in the number of Sheet Metal Worker-represented employees if the Union were selected. We understand his testimony to be a denial of the alleged threat that he, or the Respondent, would retaliate by reducing Sheet Metal Worker-represented employees.

[14] We observe that in *Systems West LLC*, the Board cited uncontradicted testimony by a union organizer that the union did not require employers to sign its standard agreement as a further basis for rejecting the employer's asserted reliance on it. The case is distinguishable for this reason as well, because no evidence of that character was presented in this case.

ered by the union's standard contract when it merely waved the contract at employees during a meeting, and failed to introduce the contract as evidence at the hearing or to otherwise document its claims. Moreover, there was no evidence in that case regarding the bargaining position the union would take if negotiations occurred. In contrast, the Respondent here cited and read from the proposed agreement presented to it by the Plumbers Union and introduced it into evidence at the hearing.[15]

Our dissenting colleague asserts that the Respondent had control of the work assignment and that Ruddy "would reasonably realize that" and "would interpret [Eagleson's] comments as threats of retaliation." Ruddy, the only employee allegedly threatened, did not testify that Eagleson threatened him. In his testimony, Ruddy repeatedly acknowledged that what he heard was just Eagleson's opinion. The entire tenor of Ruddy's testimony is clearly that of Eagleson repeatedly telling him his interpretation of the Plumbers' contract and Ruddy simply not buying into it. We do not disagree that the test under Section 8(a)(1) is whether objectively Eagleson's comments had a reasonable tendency to be coercive in the totality of the circumstances. However, in the circumstance here, we do not find that Ruddy would reasonably interpret Eagleson's comments as threats.[16]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Center Construction Company, Inc. d/b/a Center Service System Division, Burton, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(d) and reletter the subsequent paragraphs.

2. Insert the following after paragraph 2(b) and reletter the subsequent paragraphs:

"(c) Consider the remaining discriminatees for future job openings that arise subsequent to the beginning of the hearing in accord with nondiscriminatory criteria, and notify the discriminatees, the Charging Party, and the Regional Director for Region 7 of such openings in positions for which the discriminatees applied, or substantially equivalent positions."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. August 27, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part.

The judge and my colleagues find that the Respondent unlawfully solicited grievances when, as employee Wayne Rose was leaving after their August meeting ended, Robert Eagleson said, "[i]f you have any problems with this company, I'm the President . . . you need to discuss them with me." I disagree. The judge noted that "[i]t is well established [ ] that an employer cannot rely on past practice to justify solicitation of employee grievances if the employer significantly alters its past manner and methods of solicitation during the union campaign." *House of Raeford Farms*, 308 NLRB 568, 569 (1992), enfd. mem. 7 F.3d 223 (4th Cir. 1993), cert. denied 511 U.S. 1030 (1994). . The judge found that Eagleson's statement violated Section 8(a)(1) because it changed the Respondent's policy which required that employees first go to the supervisor. However, as discussed infra, Eagleson's remark, without more, did not change the existing policy. Nor was Eagleson making a promise to correct employee complaints. I would, therefore, reverse the judge's finding of a violation.

As to the issue of whether there was a change of policy, my colleagues say that Eagleson's parting remarks were a directive to deal directly with him. But my colleagues read far too much into his words. Eagleson did not say that employees should refrain from the practice of seeing their supervisors first. He merely indicated that, as always, he was the ultimate authority and that

[15] Contrary to our dissenting colleague, the Board in *Schaumberg Hyundai* did not state that the "burden of proof is on the employer to demonstrate that its prediction is lawfully based." We agree that an employer must articulate the objective evidence supporting its prediction. However, the burden of proving that a challenged statement interferes with, restrains, or coerces employees in the exercise of their Sec. 7 rights rests with the General Counsel. An employer is not required to prove that its statements are lawful.

[16] The dissent asserts that we neglect the effect that an employee's economic dependency on their employer has on the employee's tendency to "pick up intended implications . . . that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). We do not neglect this principle. Rather, we find for the reasons stated above that that the principle is not contravened by Eagleson's opinion that the Plumbers would take Sheet Metal Workers' jobs because "they do the same thing that [sheet metal workers] do."

employees could ultimately see him. Eagleson's uncontradicted testimony on this point, which was not specifically discredited by the judge, shows that his parting remarks were not a change to the existing policy. When Rose mentioned that he was not receiving health insurance, Eagleson asked him if he had said "anything to anybody?" Rose said that he might have mentioned it to his supervisor but was unsure. Eagleson then asked him if he said anything to "my Office Manager, Debbie" who handles such matters and "…why did you not say something to Debbie? She is the one that puts you on the health insurance." In short Eagleson was not telling Rose that he should go directly to Eagleson. Eagleson was telling Rose precisely the opposite.

The cases relied on by my colleagues and the judge are inapposite.[1] In those cases, there was evidence that the employer significantly altered existing practices or instituted new policies.

Perhaps recognizing that Eagleson's parting remarks without more can not fairly be understood as changing the existing policy, my colleagues rely upon findings that the judge himself did not make. Unlike the judge, they assert that by asking Rose during the meeting if he had any questions or concerns, Eagleson violated the Act. I disagree. Even if there was a solicitation of a grievance, such a solicitation is unlawful only if it contains an express or implied promise to rectify the grievance. Here, there was no such promise.

Eagleson did not promise to remedy Rose's complaint: he did not tell Rose he "would" get health insurance. Eagleson testified that he told Rose that he "should be getting health insurance" because he was eligible at 90 days and that coverage was "automatic, typically." I see nothing unlawful in truthfully telling Rose about benefits that he "should" have been receiving from the Respondent but which, apparently erroneously, he was not receiving and which the Respondent may have been legally obligated to provide to him.

Dated, Washington, D.C. August 27, 2005

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, concurring and dissenting in part.

In a plain effort to incite a clash between its employees, the Respondent's president and owner, Robert Eagleson, threatened Sheet Metal Workers Union Steward Patrick Ruddy that three or four of the Respondent's employees represented by the Sheet Metal Workers Union would lose their jobs if its plumber employees chose representation by the Charging Party Local 370. The judge correctly found Eagleson's statements to be unlawful threats of job loss. See *Systems West LLC*, 342 NLRB No. 82 (2004); *Schaumburg Hyundai, Inc.*, 318 NLRB 449 (1995). Contrary to precedent, the majority reverses this finding. I therefore dissent.[1]

A. Background

Local 370 sought to represent the Respondent's two plumber employees, a journeyman and an apprentice, and the employees already represented by the Sheet Metal Workers Union supported this organizing effort. The Respondent resisted this organizing attempt aggressively and unlawfully. It engaged in surveillance of its Sheet Metal Workers Union employees' activities in support of Local 370; threatened to discharge Sheet Metal Workers Union employees for honoring a Local 370 picket line; disciplined employees for participating in or honoring the picket line; coercively interrogated an applicant for a plumber job about his union sympathies; solicited and implicitly promised to rectify grievances from one of the plumber employees; prohibited that employee from wearing a union T-shirt at work, and thereafter discriminatorily discharged him, and discriminatorily failed and refused to consider and hire Local 370 members who applied for advertised jobs.

In the midst of this unlawful conduct, Eagleson summoned Union Steward Ruddy to his office. Service Manager Lonnie Katt was also present. Eagleson had open in front of him a copy of Local 370's collective-bargaining agreement with the Flint [Michigan] Association of Plumbing and Mechanical Contractors. Accord-

[1] *House of Raeford Farms*, supra (employer switched from occasional, voluntary meetings to numerous, mandatory meetings during which it admittedly solicited grievances, pledged to correct them and did correct them); *Embassy Suites Resort*, 309 NLRB 1313 (1992) (employer's introduction, immediately before election, of a new handbook establishing a council for employee appeals and solving problems was found objectionable but, since not alleged to violate the Act, the Board did not reach if it was unlawful); *Safety Kleen Oil Services*, 308 NLRB 208 (1992) (after employer became aware that employees had contacted the union, it scheduled an employee meeting where employer solicited complaints and expressly promised to remedy them); *Avondale Industries*, 329 NLRB 1064, 1101–1102 (1999) (superintendent specifically solicited safety complaints from employees that he promised to remedy if the employees' supervisors failed to do so); and *Amptech, Inc.*, 342 NLRB No. 117, slip op. at 9–10 (2004) (employer in direct response to the organizing effort introduced an entirely new employee advocacy program "to help resolve employee issues").

[1] In all other respects, I agree with the majority opinion.

ing to Ruddy,[2] Eagleson read "bits and pieces" of the contract out loud and "explain[ed]" or "[tried] to explain" what he thought the language meant. The record, however, contains nothing about any such "explanations." Eagleson told Ruddy that, in his (Eagleson's) opinion, if Local 370 represented the plumber employees it would have an adverse impact on the Sheet Metal Workers' employees. Eagleson read from, and directed Ruddy's attention to, article X, Jurisdiction, of the agreement.[3] He told Ruddy, "If we let the Plumbers come in here, it is going to take three or four of your men's positions." Eagleson then immediately asked, "Who would [you] like to get rid of here?" Ruddy replied, "I don't want to get rid of anybody."

About 2 days later, Eagleson again summoned Ruddy to his office. He again told Ruddy how many jobs the Sheet Metal Workers' employees would lose if the two plumber employees selected Local 370.[4] Ruddy credibly testified that Eagleson was "trying to impress on me the point that the Plumbers were going to take ou[r] jobs."

Based on these facts, the judge found that Eagleson's remarks to Ruddy, intended to provoke a clash between the Sheet Metal Workers Union and Local 370, violated Section 8(a)(1) of the Act. He rejected the Respondent's argument that Section 8(c) of the Act protected Eagleson in voicing his opinion on the effect that the Local 370 contract would have on the sheet metal workers.

B. Analysis

The threats at issue here are virtually indistinguishable from threats recently found unlawful by a unanimous panel of the Board in *Systems West LCC*, supra, applying *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In reversing the judge's finding here, the majority fails to abide by this precedent.

In *Gissel Packing Co.*, supra, the Supreme Court described what employers may lawfully say about the consequences of unionization.

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased *on the basis of objective fact* to convey an employer's belief as to *demonstrably* probable consequences beyond his control.
> . . .

395 U.S. at 618 (emphasis added). The burden of proof is on the employer to demonstrate that its prediction is lawfully based. *Schaumburg Hyundai*, supra, 318 NLRB at 450.[5] The Respondent has not met that burden. Rather, Eagleson's statements fail to meet both elements of a lawful prediction of the adverse consequences of unionization. That is, his statements—"If we let the Plumbers come in here, it is going to take three or four of your men's positions"—were neither based on objective fact nor did they address consequences beyond the Respondent's control.

First, the record contains nothing showing that Eagleson presented any evidence to Ruddy justifying his assertion about the loss of Sheet Metal Workers' positions. Nor did the Respondent present any evidence at the trial establishing objective fact upon which Eagleson's prediction was based.

The majority says that Eagleson was expressing an opinion, based on his understanding of the collective-bargaining agreement that Local 370 would try to get the Respondent to enter into if the two plumbers chose representation by the Plumbers Union. In expressing his opinion, the majority asserts, Eagleson repeatedly quoted from the Local 370 collective-bargaining agreement and made it clear that he was relying upon the language of that document as the basis for his opinion. Eagleson, of course, did not even acknowledge having a meeting with Ruddy, and he denied saying anything to anyone about a reduction in the number of Sheet Metal Workers' employees if Local 370 were selected. Ruddy's testimony that Eagleson read "bits and pieces" of the contract out loud and "explain[ed]" or "[tried] to explain" what he thought the language meant fails to support my col-

[2] Ruddy's testimony about his meetings with Eagleson was specifically credited. Katt did not testify and Eagleson was generally discredited.

[3] Art. X, Jurisdiction, is a four-page, 159-line article that sets out 51 numbered types of multifaceted tasks, equipment, material, fixtures, etc., over which Local 370 asserts jurisdiction under its collective-bargaining agreement with the contractors association.

[4] During these meetings, Eagleson offered to let Ruddy look for himself at the Local 370 collective-bargaining agreement with the contractors association: "[Eagleson] said it was there for me to see. . . . He said 'Here, read it yourself.'"

[5] The majority disputes this assertion. To be precise, the Board in *Schaumburg Hyundai* held "that the judge wrongfully imposed on the General Counsel the burden of showing that unionization would not cause lower wages and harsher working conditions as Weissberg said would occur if employees voted in the Union. Although an employer can legitimately make a prediction, as Weissberg did here, regarding the precise effects of unionization, the prediction must be carefully made on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond its control. *NLRB v. Gissel*, [supra]." Id. at 450. The clear import of this holding is that the Respondent, not the General Counsel, has the burden of showing that its "prediction" has been "carefully made on the basis of objective fact" to convey its "belief as to demonstrably probable consequences beyond its control."

leagues' assertion that Eagleson offered or attempted to offer objective evidence for his opinion about the effect of unionization by the Plumbers Union based on available facts. The record contains absolutely nothing about the substance of Eagleson's so-called explanations. And Eagleson's offering to let Ruddy simply read the Plumbers collective-bargaining agreement for himself certainly does not satisfy the *Gissel* requirement that Eagleson's prediction about the effect of unionization by the Plumbers Union be carefully phrased on the basis of objective facts. Accordingly, the Respondent has not established that Eagleson's statement was based on objective fact.[6]

Second, the adverse consequences that Eagleson predicted involved choices over which the Respondent would have either complete or partial control. My colleagues assert that Eagleson was merely stating that the Plumbers Union would propose, and the Respondent would agree, to a contract with certain clauses that would require the Respondent to lay off some employees. They further assert that Eagleson made it clear to Ruddy that if Sheet Metal Workers' unit jobs were eliminated from the unit as a result of unionization of the two plumber employees, it would only be in response by the Respondent to a Plumbers Union's initiative. On this question, *Systems West* is controlling. There the respondent sought to defend its supervisor's statement—that if the employees unionized they would not be able to work outside of the area and that most of them would be replaced—on the basis of a master labor agreement introduced into evidence at the hearing, which obliges the signatory employer to first employ individuals dispatched from union hiring halls. The Board held that the Master Agreement did not establish the objective factual basis of the supervisor's statement; nor did its terms render the matters the supervisor addressed beyond the Respondent's control. There was no evidence that the respondent and union would be bound by that or any similar agreement, or that the respondent was required to be a signatory. Any suggestion, therefore, that the respondent would be required to hire first from union hiring halls, the Board said:

> ignored the reality that such provisions are neither inevitable nor immutable, but are merely terms that *may* result from collective bargaining, and thus are at least partly within the Respondent's control. See *Schaumburg Hyundai, Inc.*, 318 NLRB 449, 450 (1995) (even if union's standard contract provided for wages and working conditions predicted by employer, bargaining unit employees would not automatically be covered by such an agreement following negotiations). [*Systems West*, 342 NLRB No. 82, slip op. at 2.][7]

The same logic applies here. Pointing to the Local 370 agreement, as Eagleson may have done, does not alter the fact that the Respondent would not necessarily become signatory to that agreement or agree to its jurisdictional provision. That would be a matter within its control.[8] And whatever the agreement may say about jurisdiction claimed by Local 370, the assignment of work is surely not beyond the Respondent's control. Just as surely, Ruddy, hearing Eagleson's comments, would reasonably realize that and instead would interpret those comments as a threat of retaliation for the Sheet Metal Workers' support of Local 370.[9] As *Gissel* teaches, we must "take into account the economic dependency of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." 395 U.S. at 617. The majority neglects this principle.

Finally, that Eagleson may have couched his remarks as his opinion, as the majority asserts, based on his understanding of the Local 370 agreement, is insufficient to mitigate their coercive effect. *Clinton Electronics Corp.*, 332 NLRB 479, 479 (2000). Nor does the majority accurately claim that Ruddy understood Eagleson's statements as merely an opinion, and not a threat. Ruddy credibly testified that Eagleson was "trying to impress on me the point that the Plumbers were going to take ou[r]

[6] My colleagues assert that even the judge did not question the reasonableness of the Respondent's interpretation of the relevant clauses in the Plumbers contract. But, again, there were no interpretations by the Respondent in the record for the judge to evaluate in the first place. The judge specifically found in the fourth and final paragraphs of sec. III,A,4 of his attached decision that "the Respondent presented no evidence of objective facts supporting 'demonstrably probable consequences' . . . beyond the Respondent's control, to justify or support its threat that three or four jobs would be lost."

[7] My colleagues have not meaningfully distinguished *Systems West*. They assert that the Board rejected the employer's reliance on the master labor agreement in that case because it was raised for the first time as a posthoc justification at the hearing, and also because there was no evidence in any event that the employer and the union would have been bound by that or any other agreement. While those considerations were factors in the Board's analysis, they were not controlling.

[8] Under the law, union demands are always negotiable, and absent some proof, an employer has no basis for assuming that he will be forced by a union to act to his own detriment. *Paul Distribution Co.*, 264 NLRB 1378, 1383 (1982).

[9] Although my colleagues note that Ruddy did not actually testify, in haec verba, that Eagleson threatened him, they correctly acknowledge that that is not determinative of the result, and that the test under Sec. 8(a)(1) is whether Eagleson's comments objectively had a reasonable tendency to be coercive in the totality of the circumstances.

jobs." Eagleson made that point clear when he asked Ruddy, "Who would [you] like to get rid of here?"

Dated, Washington, D.C. August 27, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire or fail and refuse to consider for hire job applicants on the basis of their union affiliation or other protected activities.

WE WILL NOT discharge or otherwise discriminate against any employee on the basis of the employee's union affiliation or other protected activity.

WE WILL NOT threaten to discipline or discharge any employee for honoring a picket line at our facility.

WE WILL NOT unlawfully photograph employees who are engaged in picketing.

WE WILL NOT solicit complaints from employees or change the manner in which complaints are handled while a union is conducting an organization drive at our facility.

WE WILL NOT prohibit employees from wearing shirts with union insignia.

WE WILL NOT interrogate applicants for employment concerning their viewpoints on unions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time journeymen plumbers, plumber apprentices, and plumber helpers engaged in the fabrication, installation, and service of plumbing equipment employed by Respondent at its facility located at 4040 E. Bristol Road, Burton, Michigan; but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, and all employees currently included in the bargaining unit represented by Sheet Metal Workers International Union, Local Union No. 7.

WE WILL, within 14 days from the date of the Board's Order, offer Wayne Rose full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Wayne Rose whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Wayne Rose, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, offer 1 of the 12 discriminatees listed below full instatement to the journeyman plumber position to which that person applied in response to our advertisement in the Flint Journal on August 17, 2003, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he would have enjoyed had he been hired when he applied.

Maurice Cahill, Jermaine Connor, Gerald Cox, David McDermitt, Michael Morris, Dennis Slattery, Jack Steco, Eric Backlund, Michael Herriman, Scott Mobilio, William Wise, and Chester Solarz

WE WILL make the applicant who is offered the journeyman plumber position whole for any loss of earnings and other benefits resulting from our failure and refusal to hire him, less any net interim earnings, plus interest.

WE WILL consider the remaining discriminatees for future job openings that arise subsequent to the beginning of the hearing in accord with nondiscriminatory criteria, and notify the discriminatees, the Charging Party, and the Regional Director for Region 7 of such openings in positions for which the discriminatees applied, or substantially equivalent positions.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful refusal to hire any of the discriminatees, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

CENTER CONSTRUCTION COMPANY, INC. D/B/A CENTER SERVICE SYSTEM DIVISION

Kelly A. Temple, Esq., for the General Counsel.
Hiram S. Grossman, Esq., P.C. (Daniel & Grossman, P.C.), of Flint, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOSEPH GONTRAM, Administrative Law Judge. This case was tried in Flint, Michigan,on May 18–20, 2004. In Case 7–CA–46490, the charge was filed by Local 370, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO (Local 370 or the Union) on August 8, 2003,[1] and was amended on August 25 and September 19. In Case 7–CA–46696, the charge was filed by Local 370 on October 7, and was amended on November 3. In Case 7–CA–46697, the charge was filed by Local 370 on October 7. The Acting Regional Director for Region 7 ordered that the cases be consolidated and, on December 23, issued a consolidated amended complaint. With the agreement of counsel, the complaint was amended at the hearing.

The amended consolidated complaint alleges that Center Construction Company, Inc. d/b/a Center Service System Division (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) (1) by threatening to discipline and fire employees if they honored a picket line at the Respondent's facility; (2) by surveilling its employees' activities on the picket line; (3) by threatening adverse employment actions, including termination, if Local 370 was selected to represent the plumbers employed by the Respondent; (4) by soliciting grievances from, and promising better benefits to, its employees to discourage the employees from supporting a union; (5) by promulgating and enforcing a rule prohibiting employees from wearing shirts with union insignia; (6) by interrogating employees about their union sympathies; and (7) by telling employees that if they were interested in a union, they should talk to the Respondent's owner first. The amended consolidated complaint further alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by refusing to consider and hire members of Local 370 for available positions for plumbers, and by discharging employee Wayne Rose, and violated Section 8(a)(1) and (5) of the Act by refusing to bargain collectively with Local 370. The Respondent admits all jurisdictional allegations, but denies that it has committed any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is engaged in the sale, installation, and service of heating, air-conditioning, and plumbing systems from its facility in Burton, Michigan, where, during the calendar year preceding the filing of the present complaint, it had gross revenues in excess of $500,000 and purchased and received goods valued in excess of $50,000 from suppliers within the State of Michigan, which suppliers had received these goods directly from points outside the State of Michigan. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 370 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Robert Eagleson (Eagleson) is the president and owner of the Respondent. In the 1950s, his father established Bernhart Eagleson Plumbing & Heating, which later became R. W. Eagleson Plumbing & Heating. In 1964, Eagleson's father established Center Construction Company to do general construction throughout Michigan. In 1970, Eagleson took over management of Center Construction. In 1973, Eagleson established Center Service System, the Respondent, which, like his father's plumbing business, primarily does residential plumbing and heating. Kristina Eagleson, Eagleson's daughter, has worked for the Respondent for 20 years, and is currently the production manager. Kristina has a journeyman plumber's license and a master plumber's license. Matthew Welsh is the Respondent's plumbing supervisor. The Respondent admits that Kristina Eagleson and Welsh are supervisors within the meaning of Section 2(11) of the Act.

Eagleson's father's plumbing and heating businesses had contracts with Local 370 for several years. Eagleson himself was a member of Local 370 for more than 15 years. The Respondent has never had a contract with Local 370. In the 1990s, Local 370 unsuccessfully attempted to organize the Respondent on two occasions. Each time, Local 370 requested the Respondent to extend voluntary recognition, and each time the Respondent refused. After the Respondent's refusals, Local 370 filed representation petitions with the National Labor Relations Board, both of which were unsuccessful. The Respondent has had a contract with Local 7 of the Sheet Metal Workers Union for over 20 years. The Respondent generally employs between 20 and 40 sheet metal workers, and 2 or more plumbers.

The basic distinction between plumbers and sheet metal workers is that plumbers deal with piping, which is wet and carries liquid. Plumbers are also called fitters or pipe fitters. Sheet metal workers deal with ductwork, which is dry and carries air.

In July and August 2003, Local 370 again sought to organize the Respondent's plumbers. At that time, there were two poten-

[1] All dates are in 2003, unless otherwise indicated.

tial members of the bargaining unit—Wayne Rose, a journeyman plumber, and Lance Lockhart, a plumber's apprentice.

B. Local 370's Organizing Activities and Related Events Before August 17

On July 30 and 31, Rose and Lockhart, respectively, signed authorization cards for Local 370. On August 4, Benjamin Ranger, the Union's organizer, and Mark Johnson, the business manager, met with Eagleson in Eagleson's office. Ranger and Johnson told Eagleson that Local 370 was organizing the Respondent's plumbers, and had secured the signatures of the two unit members. Ranger asked Eagleson for recognition so that the parties could start bargaining immediately. Eagleson claimed he did not know that he had two plumbing employees, and after confirming that he did, he asked to see the authorization cards. Ranger then showed Eagleson the two cards signed by Rose and Lockhart.[2] After examining the cards, Eagleson stated that he would never sign an agreement with Local 370 and would go out of business before signing an agreement with Local 370. Ranger replied he would seek other legal means to obtain recognition.

The next day, August 5, Ranger mailed and faxed a letter to Eagleson demanding immediate recognition of Local 370 as the representative of the Respondent's plumbing employees. (On August 5, Ranger also signed and mailed to the Board a representation petition.) However, Ranger's letter contained an inadvertent, and inconsistent, description of the represented employees as the Respondent's HVAC employees, rather than the plumbing employees. The HVAC employees were already represented by the Sheet Metal Workers Union. Eagleson claims that the letter confused him regarding the employees Local 370 sought to represent. This claim is not credible. Moreover, Eagleson exploited the inadvertent reference to HVAC employees in the letter to explain his own actions in refusing to recognize Local 370 and to drive a wedge between Local 370 and Local 7 of the Sheet Metal Workers Union. On August 8, and immediately after being advised of the error, Ranger mailed and faxed a corrected letter to Eagleson eliminating the reference to the HVAC employees.

On August 4, Eagleson met with Local 370 representatives who sought recognition on behalf of the Respondent's plumbing employees. Eagleson observed, inspected, and read the cards that were signed by his two plumbing employees, and that were handed to him by Ranger. He then lashed out at Ranger and Johnson, telling them that he would never sign a contract with Local 370 and would rather go out of business. Thus, when Eagleson received Ranger's August 5 letter on that date, Eagleson knew that the reference to HVAC employees was a mistake, and that Local 370 was, in fact, seeking to represent only his plumbing employees, which is what Ranger and Johnson told Eagleson on August 4. Of course, if the letter confused Eagleson, the natural reaction would be to telephone Ranger and ask him about the letter, i.e., to try to clear up any confusion. But Eagleson did not try to clear up any confusion because there was none. Instead, a copy of the letter was given to the steward of the Sheet Metal Workers Union. In this way, Eagleson tried to exploit what he knew was an inadvertent mistake in order to drive a wedge between Local 370 and the Sheet Metal Workers Union. When Ranger became aware of the mistake in his letter, he corrected the mistake, and mailed and faxed a corrected letter to Eagleson on August 8.

In making my credibility determinations, I am aware that Ranger and Johnson gave one version, and Eagleson gave another version of what occurred during their meeting. The testimony of Ranger and Johnson has been credited and the testimony of Eagleson has been discredited because of the demeanor of these witnesses. In addition, Ranger and Johnson corroborate each other, and their testimony is more plausible. For example, Ranger and Johnson testified that Ranger handed the signed authorization cards to Eagleson who examined them for several minutes. This testimony is consistent with the purpose of the meeting, which was to alert Eagleson to the organization of Respondent's plumbers and to request recognition for Local 370. Moreover, Eagleson testified that he does not recall if Ranger handed him the cards, and he does "not believe" that he read them. (Tr. 435.)[3] (This testimony is not only incredible, it is also not determinative of the factual issue. Ranger had already told Eagleson that the two members of the unit had signed cards, and Eagleson knew the two members of the unit were Rose and Lockhart.) Thus, the testimony of Ranger and Johnson is also more credible because of their specific recollection, as opposed to Eagleson's vague recollection. On the other hand, given the importance of the cards, Eagleson would recall if the cards were shown to him. Accordingly, his claim of not being able to recall is itself not credible.

Johnson and Ranger also testified that Eagleson stated he would never sign an agreement with Local 370. Eagleson testified that he said he would never sign an agreement without seeing the contract first. Again, Eagleson's testimony is not credible and is rejected. Eagleson's claimed statement essentially says nothing. Of course he would not sign an agreement without seeing it first. Moreover, Eagleson was present in the hearing room for Ranger's and Johnson's testimony, and it is apparent that he tried to conform his recollection of these events as close as possible to what actually occurred, without acknowledging the true meaning of what was said. As if Ranger and Johnson heard him say, "I will never sign an agreement with Local 370," but failed to hear the remainder of the sentence, "without seeing it first." Eagleson was not a credible witness. Moreover, Eagleson's demeanor on the witness stand

[2] All facts found here are based on the record as a whole and on my observation of the witnesses. The credibility resolutions have been made from a review of the entire testimonial record and exhibits with due regard for logic and probability, the demeanor of the witnesses, and the teaching of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404 (1962). As to those witnesses testifying in contradiction of the findings, their testimony has been discredited, either as having been in conflict with the testimony of reliable witnesses or because it was incredible and unworthy of belief or as more fully explained in the text. With respect to the testimony regarding what occurred at meetings between a manager and an employee, I have also taken into account the economic dependence of employees on employers, with awareness of an employee's attentiveness to intended implications of his employer's statements which might be more readily dismissed by a disinterested party. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

[3] References to the transcript of the hearing are designated as Tr.

displayed an antiunion animus notwithstanding his ingratiating reference to his having been a member of Local 370 for many years. During his meeting with Ranger and Johnson, Eagleson did not qualify his refusal to sign an agreement with Local 370, except to exacerbate the antiunion animus contained in the statement by adding that he would go out of business before signing an agreement with Local 370.

After Eagleson received the fax of Ranger's August 5 letter, he telephoned Johnson and requested a copy of the plumbers' proposed collective-bargaining agreement. Eagleson said that he would like to look over the agreement and discuss what could be done.

On August 6, at approximately 6:45 a.m., Local 370 set up a picket line at the Respondent's facility. Ranger, Johnson, and other members of Local 370 picketed, together with Lockhart and other employees of the Respondent.[4] Johnson brought the proposed collective-bargaining agreement, and provided a copy to Eagleson inside the Respondent's facility. Johnson and Eagleson had a brief discussion in which Eagleson said that he had no problem if his employees wanted to join a union. Johnson returned to the picket line, and the picketing continued until mid-afternoon on August 6.

The question that arises is, why would Eagleson request a copy of an agreement that he had already told Ranger and Johnson he would never sign? The answer is that Eagleson wanted to use the agreement to further his efforts to drive a wedge between Local 370 and the Sheet Metal Workers. Moreover, contrary to Eagleson's statement to Johnson, Eagleson had no intention to talk with Local 370 about what could be done with an agreement. On August 7, Eagleson met with Patrick Ruddy, the Sheet Metal Workers' steward, in Eagleson's office. Service Manager Lonnie Katt was present during the meeting, but he was not called as a witness. Eagleson read aloud certain parts of the plumbers' agreement that he had just received from Johnson, told Ruddy his interpretation of the agreement, and tried to impress on Ruddy that the plumbers were trying to take jobs away from the sheet metal workers. Eagleson then told Ruddy, "If we let the Plumbers come in here, it is going to take three or four of your men's positions. Who would [you] like to get rid of here?" (Tr. 107.) Ruddy, of course, said he did not want to get rid of anybody. A few days later, Eagleson again met with Ruddy and again told him that the plumbers were trying to take the sheet metal workers' jobs.

On August 6, after Johnson had provided Eagleson with a copy of the collective-bargaining agreement, Johnson returned to the picket line. Later, Eagleson and Welsh came out to the front of the facility and observed the picketing. The Respondent's sheet metal workers would not cross the picket line, and they were congregating in a parking lot across from the facility where the Respondent's trucks were parked. Johnson held a video camera, and he recorded, for approximately 10 minutes, some of the activity in and around the picket line. Welsh went back inside the facility and returned with a camera. He then took pictures of the picket line, which included the Respondent's workers, as well as pictures of the sheet metal workers across the street. Welsh then walked over to the sheet metal workers and told them to get to work or he would make sure that they would be fired.[5]

At approximately noon, Kristina Eagleson came out to the picket line and handed letters to the Respondent's employees. The letters were signed by Eagleson and stated:

> Your absence on August 6th was not excused. You must report to work on August 7, 2003 and each work day thereafter.
>
> Additionally, you must return all company property to work on August 7, 2003 whether or not you intend to report to work on August 7th and each work day thereafter, your retention of company property on or after August 7th, 2003 is not authorized and Center Service will report to the proper authorities that you have Center Service property without authorization.
>
> Your failure to report for work on August 7th and work on August 7th, 2003 and each work day thereafter and return company property on August 7th will result in Center Service imposing discipline on you.

(GC Exh. 14.) The picketing ended in the afternoon of August 6, and all employees returned to work on August 7.

C. Applications for Employment From Local 370 Members

On August 17, the Respondent advertised in the local newspaper, the Flint Journal, for journeymen plumbers, HVAC installers, and service technicians. The advertisement read as follows:

> PLUMBERS—State Licensed Journeyman, HVAC Installers and Service Tech. Competitive wages, health-care benefits, opportunity to earn monthly bonus for self motivate[d] conscious [sic] People. Apply at Center Service, 4040 E. Bristol Rd. Burton

(GC Exh. 6.) On August 18, Ranger called the Respondent's offices in response to the advertisement, and he was told by a secretary/receptionist that the Respondent was still hiring. Ranger told some members of Local 370 about the Respondent's advertisement for plumbers. Other union members had already seen the advertisement.

On August 18, eight plumbers, all members of Local 370, went in a group with Ranger to the Respondent's offices to apply for the plumber positions advertised in the newspaper. These union members were Maurice Cahill, Jermaine Connor, Gerald Cox, David McDermitt, Michael Morris, Dennis Slattery, Jack Steco, and Richard Young.[6] The plumbers re-

[4] The Respondent's employees who picketed included Lockhart, Patrick Ruddy, Michael Oliver, and Kevin Deconig.

[5] In evaluating the credibility of testimony regarding the statements of supervisors, as well as the owner, to employees, I have also taken into account the economic dependence of employees on employers, with awareness of an employee's attentiveness to intended implications of his employer's statements which might be more readily dismissed by a disinterested party. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). The Respondent admits that Welsh and Kristie Eagleson are supervisors within the meaning of Sec. 2(11) of the Act.

[6] The Respondent has possession of the applications completed by these plumbers except for the application of Cox. Cox testified that he completed and submitted an application, and other witnesses confirmed

quested applications from the secretary/receptionist. She copied and distributed the applications to the eight plumbers. However, she gave no instructions to the plumber-applicants concerning how or where the applications were to be completed. The reception area was not large, and there were not enough chairs to accommodate all of the plumbers, so they went to their automobiles in the parking lot to complete the applications. The completed applications were then given to the secretary/receptionist who, again, said nothing about the applications or the way in which the plumbers had completed them.

Ranger did not complete his application on August 18. Instead, he took his blank application to the Union's offices, made copies, and distributed the blank applications to five more union members. These union members, Eric Backlund, Michael Herriman, Scott Mobilio, Kenneth Wheeler, and William Wise completed the applications at the Union's offices. On August 19, these union members went with Ranger to the Respondent's offices and handed the completed applications to the secretary/receptionist who said nothing about the applications or the way in which they had been completed.

On October 2, three additional union plumbers went to the Respondent's offices to apply for a job. These plumbers were Alexander Gallant, Carl Nelson, and Chester Solarz. The secretary/receptionist gave them each an application, which they completed in the waiting area. They handed the completed applications to the secretary/receptionist who, like the previous two occasions, said nothing about the way in which the applications were completed.

Thus, 16 plumbers, all of whom were members of Local 370, completed and submitted applications for the plumber positions advertised by the Respondent on August 17. At least 13 of these plumbers were licensed, journeyman plumbers.[7] Steco and Cahill are master plumbers. The experience of the 16 plumbers ranged from a minimum of 7 years (Connor and Solarz) to almost 50 years (Steco). The plumbers had experience in both commercial and residential plumbing. One of the plumbers (Slattery) had worked for the Respondent in the past. Steco and Eagleson attended the same apprentice plumbing classes together in 1965 and have been friends since that time.

The Respondent knew that these applicants were Local 370 members. The first two groups of plumbers entered the Respondent's facility led by Ranger. Eagleson knew Ranger because he had met with Ranger on August 4 when Ranger demanded recognition of Local 370. Moreover, some of the applications in all three groups of union members who applied for a job disclosed that the applicant was a member of Local 370.[8] In any event, the Respondent has not claimed herein that it was unaware of the applicants' membership in Local 370.

The Respondent did not call any of the Local 370 plumber-applicants for an interview, or for any follow up information, or for any other reason. Instead, Welsh solicited Jeffrey Blasdell in early October, long after the Respondent's advertisement for plumbers and long after the union plumbers had applied for the position. The Respondent hired Blasdell as a plumber on October 6. On October 20, the Respondent hired Bradley Liddell as a plumber. The Respondent also hired David Lawrence in late August-early September and Chance Crosno in mid-October as plumber's helpers or apprentices. Blasdell, Liddell, and Lawrence had formerly worked for the Respondent.

D. Interrogation of David Lawrence

David Lawrence is a plumber's apprentice. He had worked for the Respondent as a plumber's apprentice from July to December 2000. He saw the Respondent's August 17 newspaper advertisement and telephoned Welsh. Welsh asked Lawrence to bring in a resume, but Lawrence did not. About 2 weeks later, Welsh telephoned Lawrence, asked him to come into the Respondent's offices to complete an application, and reminded Lawrence to bring a resume. On the last Thursday in August, Lawrence went to the Respondent's offices and spoke with Welsh. When that interview concluded, Lawrence and Welsh went into Eagleson's office. Eagleson asked Lawrence how he felt about unions. Lawrence replied that there were pros and cons. Lawrence gave Eagleson this reply because he felt that it was what Eagleson wanted to hear, and Lawrence was anxious to get a better paying job. Eagleson told Lawrence that if he were interested in joining a union, Eagleson could place him in the Sheet Metal Workers' union. Eagleson offered Lawrence a job that day as a plumber's apprentice.

E. Events Involving Wayne Rose

The Respondent hired Wayne Rose as a journeyman plumber in January 2003. Rose interviewed with and was hired by Welsh. Rose had virtually no contact with Eagleson during his first 8 months on the job. The first conversation Rose ever had with Eagleson was in mid-August, which was about 2 weeks after Rose had signed a union authorization card for Local 370, less than 2 weeks after that card was shown to Eagleson, and about 1 week after Local 370 had picketed Eagleson's company. Eagleson directed Rose into Eagleson's office so that Rose could pick up his paycheck, and Eagleson then started talking to Rose about the company. As Eagleson described it, he wanted to "clear up a few things" with Rose. (Tr. 451.) Eagleson first asked Rose if he had any questions or concerns about his job. Eagleson said that the company had an investment or retirement plan, and that the nonunion employees vested in the plan in 3 years. Rose asked why he was not receiving health insurance. Eagleson assured Rose that he was eligible for and would receive this insurance, and explained that

his presence on August 18. Accordingly, I conclude that Cox completed and submitted an application to the Respondent on August 18. However, I do not make any adverse inference on the Respondent's failure to locate or produce a copy of that application. Documents may be lost unintentionally, and I conclude that this occurred with respect to Cox's application.

[7] The remaining three, Richard Young, Kenneth Wheeler, and Carl Nelson, did not testify and their applications do not reveal whether they possess journeyman licenses. In spite of this lack of evidence, the Respondent has not asserted the failure to prove the licensed status of these three applicants as a reason why they were not considered for employment. In addition, Gallant has been excluded as a discriminatee because he stated on his application that he was available only for part-time work.

[8] These include the applications of Solarz, Backlund, Mobilio, Wheeler, Wise, and Herriman. Moreover, in Cahill's application, he listed Ranger as a reference.

the Respondent "was a big company and sometimes things fall through the crack[s]." (Tr. 300.)

Eagleson also testified that he had heard from Welsh, Rose's supervisor, that Rose was unhappy. Rose denies making such a claim and his denial is more credible than Eagleson's assertion. Eagleson's claim that Rose was unhappy appears to be based on Eagleson assuming this because Rose had joined the union. Although unhappiness on the job may be one reason an employee would join a union, it certainly is not the only reason. There is no credible evidence that Rose was unhappy at his job, and Eagleson's testimony that Welsh had told him Rose was unhappy is not credible.

Eagleson talked about the history of the company and Local 370's organizing efforts. Eagleson described how his father had started the business and how Eagleson had continued it. Eagleson said that Local 370 had two previous organizing drives, in 1994 and 1998, but these organizing efforts were unsuccessful, and he "eventually got rid of the [useless] sons of bitches." (Tr. 271, 302.) Rose then asked Eagleson if he considered Rose to be useless, and Eagleson replied, "No, I hear you're a good one." The entire discussion lasted about 45 minutes. When Rose was leaving the office, Eagleson told him, "If you have any problems with this company, I'm the President . . . you need to discuss these with me."[9] The previous and normal policy of the Respondent for handling employee complaints required the employee to make the complaint to the immediate supervisor, and then, if the matter were not resolved, the complaint would be referred to Eagleson.

Between 1 and 2 weeks after Eagleson's mid-August conversation with Rose, Rose wore a shirt into work that was emblazoned with the union logo and lettering. Nothing was said during the morning meeting, but as Rose was getting into his truck to go to his job, Kristie Eagleson told him to not wear the shirt on the job. She told Rose that the shirt was inappropriate and was against company policy. She told Rose that he had to change the shirt before he got to the job because she did not want the contractor on the job to think that the Respondent was paying union wages. Rose replied that the shirt was new and he was going to change it anyway. Accordingly, Rose changed his shirt before he went to the job.

The Respondent's employees are not required to wear uniforms, although they may purchase uniforms if they wish. Instead, the employees frequently wear T-shirts, which many times are emblazoned with various names and logos, including professional sports teams, college sports teams, racecar drivers, and musical groups. None of these shirts violate the policy. The Respondent's policy, if it may be called a policy, regarding clothing that is allowed on the job is sporadically mentioned to the workers. There is no written policy. As Welsh and Kristie Eagleson described the policy, prohibited shirts are shirts that contain bullet holes, pictures of marijuana plants, swear words, offensive sayings, and religious or political messages. In his posthearing brief, the Respondent's counsel describes the policy as prohibiting "items containing religious, political, offensive words, pictures or graphics." (R.'s Posthearing Br. p. 26.) The Respondent maintains that the shirt worn by Rose, which contained the name and logo of the Union, violated this policy. There is no evidence of any employee, other than Rose on this single occasion, ever being cited for violation of the Respondent's alleged clothing policy.

On September 22, Rose was working on a job in or near Clarkston, Michigan. Welsh testified that the job was in Leonard, Michigan, but he explained that the location of the job was 5–10 miles east of Clarkston. Moreover, after Eagleson had observed Rose's truck in the vicinity of Pearson Road and I-75, Welsh told Eagleson that Rose had been working that day on a job near Clarkston. Rose's time card reflects that he worked 8-1/2 hours on September 22. Rose lives in Millington, Michigan. The map provided by the Respondent of the central Michigan area shows that Clarkston abuts I-75, and that a reasonable route to take in traveling from Clarkston to Millington is to go north on I-75, then east from the Birch Run exit. (See Tr. 291; R. Exh. 8.) An alternate route is to travel north on Route 15 to Millington. Although the second route appears to be more direct, it may or may not take more time since I-75, unlike Route 15, is an interstate highway.

At approximately 6 p.m. on September 22, Eagleson observed a company truck at Interstate 75 (I-75) and Pearson Road.[10] Eagleson telephoned Welsh who said that the truck was assigned to Rose. Eagleson testified that he was concerned about the location of the truck and the time it was observed because the driver should have been home by that time of day. Notwithstanding this alleged concern, Rose's location—on or near I-75 between the jobsite in Clarkston and Rose's residence in Millington—was at least generally where he should be in traveling from the job to his residence. Moreover, the time of day is at least partially explained by the fact that Rose worked 8-1/2 hours at the job September 22. (R Exh. 7.) Eagleson told Welsh to "Check it out and find out what he [Rose] is doing." (Tr. 479.)

A couple of days later, Welsh called Eagleson and told him that Rose was using the company truck on personal time. Welsh was not asked at the hearing, and did not explain, how he knew this or how he arrived at this conclusion or whether he also knew that Rose had taken the truck to go to the Union's offices. Eagleson told Welsh that, in accordance with the Respondent's policy, Rose would have to lose the truck for a while. Eagleson told Welsh to take the truck away from Rose for at least a week or two, but not to tell Rose this.

On Thursday, September 25, Welsh called Rose while Rose was on the job, and told him to report back to Welsh at the Respondent's offices at the end of the day. Welsh explained his failure for 3 days to confront Rose with Eagleson's observation as follows: "I did not want to confront and reprimand him or discipline him for his actions until I had the opportunity to speak in detail with Bob [Eagleson] about what was observed and when, where and why." (Tr. 358.) Accordingly, before the Respondent made any decision on how to deal with Eagleson's observation of Rose on September 22, Welsh and Eagleson

[9] Tr. 272. The testimony was limited to unrepresented employees, since Rose was unrepresented at the time of Eagleson's statement.

[10] It is unclear if Eagleson observed Rose while Rose was driving on I-75 or on Pearson Road; however, the resolution of this factual matter is not relevant to the determination of any issue in this case.

spoke in detail not only about when and where Rose was observed, but also why Rose was there. And there is no dispute that Rose was in the area of I-75 and Pearson Road because he was going to talk with Local 370 officials about their organization of the Respondent's plumbers.

On September 25, and pursuant to Welsh's instructions, Rose reported to Welsh at the Respondent's facility at about 5:30 p.m. Welsh told Rose that Eagleson had seen him driving his company truck in the area of I-75 and Pearson Road on Monday at 6 p.m., and he asked Rose why he was on Pearson Road. Rose replied that he was going to the Union's offices to see Ben Ranger. Welsh suggested that this trip was 3 to 10 miles out of the way, but in fact the trip was a total of 3 miles (1-1/2 miles each way) from I-75. Rose reminded Welsh that in the past Rose had been allowed to use the company truck for personal reasons such as cashing his paycheck or going to lunch, and that the distances for these trips were much greater than the distance involved in his trip to the Union's offices on September 22. Welsh told Rose that his truck was going to be taken from him because of unauthorized use.

Welsh denies that he asked Rose where he was taking the company truck. This denial is not credible, especially in light of Eagleson's instruction to Welsh on Monday to find out what Rose was doing. Moreover, Welsh admits that he wanted to discuss in detail with Eagleson when, where, and why Rose was at the observed location. Welsh's denial, which is partially inconsistent with his own and Eagleson's testimony, but which is in keeping with his attempt during the hearing to avoid admitting any concern about or involvement in Rose's union activity, further detracts from Welsh's credibility.

After Welsh told Rose that his truck was being taken away, Rose said he needed to remove his tools from the truck, and he would need a ride home. Welsh and Rose went to the truck and Rose removed his tools. While he was removing his tools, Kristie Eagleson came out to the truck. Kristie Eagleson testified that she had heard Rose fling open the door of Welsh's office extremely hard. Kristie Eagleson and Welsh testified that Rose was cursing at his truck, saying over and over again, "That's bullshit, I quit." Kristie Eagleson testified that "Matt told him [Rose] since he quit, he needs to remove his belongings from the Company vehicle." (Tr. 417.) Upon considering their demeanor and other factors, the testimony of Kristie Eagleson and Welsh regarding these events is not credible.

Rose was impressive as a quiet, respectful, and polite person. Indeed, when Rose was interviewed for the job, Welsh noted that he was "clean cut, very polite." (GC Exh. 23.) Moreover, of the employee applications in evidence, Rose's application is the only one that contains a positive reference to the character traits of the applicant, further supporting the reliability of this impression from Rose's demeanor. The testimony of Kristie Eagleson and Welsh that Rose repeatedly said, in a raised voice, "That's bullshit, I quit" is out of character and is inconsistent with the demeanor that Rose displayed and projected at the hearing. Rose denied saying it, and his testimony is credible. Second, while they were in Welsh's office, Rose told Welsh that he needed to remove his tools from the truck. Therefore, Welsh would have had no cause to tell Rose while they were at the truck that, since he quit, he should remove his tools. Indeed, that is why they were already at the truck, so Rose could remove his tools and belongings. Rose did not quit, he did not tell Welsh that he quit, and he did not curse at Welsh.

Welsh drove Rose home. During the ride, Rose told Welsh that his van needed a sleeve cylinder, and it might take Rose a day or more to get the part and install it. Rose said he would come to work on Monday. Welsh told Rose he should come to work the next day. The next morning, Friday, September 26, at about 8:30 a.m., Rose called the office, asked for Welsh, who was not available, and told the secretary to tell Welsh that he (Rose) would not be in work on Friday. Although this was the first time during his employment that Rose called the office to report he would not be in, his telephone call in the morning of September 26, combined with his statement to Welsh on September 25, substantially met the Respondent's procedure for reporting absences from work.

The Respondent argues that Rose's testimony is inconsistent because if, as Rose claims, he told Welsh on Thursday that he would not be at work on Friday, there would be no reason for Rose to call the Respondent on Friday morning. However, this argument fails to account for Welsh's response to Rose on Thursday that Rose should still come to work on Friday. Because of Welsh's statement to Rose on Thursday, Rose's telephone call to Welsh on Friday morning to report that he would not be in work is understandable and consistent.

Welsh claims that Rose called the office on Friday, September 26, and that he talked with Rose on the telephone. Welsh claims that Rose tried to rescind his resignation during that telephone call. The Respondent did not call its secretary as a witness, nor did it offer any corroborating evidence to support Welsh's claim that he spoke with Rose or to refute Rose's claim that he left a message with the secretary. Moreover, Welsh claims that, during this alleged telephone conversation, he told Rose that he did not have the time to talk, but Rose should call him on Monday morning. However, on that same day, Eagleson signed a letter addressed to Rose (which Rose denies receiving) stating that his resignation has been accepted. (R Exh. 6.) It is not likely that Welsh would have invited Rose to call and discuss Rose's job status when, on the same day, the president and owner of the company had signed a letter stating that Rose was no longer an employee. In considering the demeanor of Welsh and Rose, and all of the circumstances, including the previous aspects of Welsh's testimony found to lack credibility, Welsh's testimony regarding the telephone call, as well as his testimony about his meeting with Rose on Monday, September 29, is not credible.

In addition, Welsh testified that, in the September 26 telephone conversation, he told Rose to telephone the office on Monday. However, Rose did not telephone the office on Monday; rather, he came into the office. This is consistent with Rose's testimony that he had not quit on Thursday and had not talked to Welsh on Friday.

The Respondent has a policy concerning the use of company trucks. Essentially, the policy is that company trucks are not to be used for personal purposes. However, like the Respondent's alleged work clothing policy, the Respondent's truck policy is not written. Moreover, there are exceptions to the policy that might be termed de minimus exceptions. For example, employ-

ees use company trucks to cash their paychecks and to pick up personal items at a store on their way to and from work. The Respondent claims that every personal trip must be approved in advance; however, in practice, preapproval is not sought or necessary in the de minimus situations. Nevertheless, and in keeping with this policy, the Respondent has taken trucks away from employees who were caught using their trucks outside of working hours.[11]

Rose arrived in work on Monday, September 29, at 7:45 a.m., and, at Welsh's request, entered Welsh's office. Welsh told Rose that he (Welsh) had thought about Rose's situation all weekend, that he knew Rose was not happy working there, that he felt Rose would be happier if he were not working for the Respondent, and that he would accept Rose's resignation. Rose replied that he did not resign and he did not understand how Welsh could presume to know how or what Rose was feeling. Welsh, having already decided, with or at the behest of Eagleson, to fire Rose, and maintaining the charade Welsh and Eagleson had initiated, simply replied that he accepted Rose's resignation.

Welsh claims that when he met with Rose on September 29, Rose again tried to rescind his resignation. Welsh claims that he told Rose that the resignation could not be rescinded because (1) Welsh felt that Rose was not happy working for the Respondent, and (2) Rose had performance problems. As noted above, Welsh is not a credible witness. Moreover, Welsh's claim that Rose had resigned on September 25 has already been rejected. Accordingly, and for all of the foregoing reasons, Welsh's testimony regarding his meeting with Rose on September 29 is not credited except to the extent that it is corroborated by Rose. For example, and as noted above, Welsh stated to Rose during their September 29 conversation that he felt Rose was not happy working for the Respondent.

Although Welsh's testimony that he mentioned performance problems to Rose is not credited, the fact that Welsh presently makes that claim is considered. Welsh testified that he had previously discussed performance problems with Rose. However, no documents were offered to substantiate or corroborate such discussions. The Respondent has never disciplined Rose for, nor has Welsh documented, any alleged performance problems. However, Welsh cited the Williamston job, where Rose worked September 23 and 24, for Rose's alleged performance problems. Rose had to be sent back twice to correct code violations on that job. Welsh testified that he told him Rose how the Williamston job should be fixed. However, Welsh is not a licensed plumber. Therefore, assuming Rose followed Welsh's instructions, it is just as likely that Welsh was as responsible as Rose for the two trips to correct the job. In conclusion, Welsh did not cite Rose for performance problems either when Rose was terminated or before that time. And the job for which Welsh claims there was a performance problem, the correction of the problem was as much the fault of Welsh as Rose.

[11] In two egregious cases, the employees were discharged, but those cases are not comparable to the present case.

III. ANALYSIS

A. Section 8(a)(1)

1. Threat to fire employees for honoring picket line

Nonstriking employees who honor a picket line set up by their coworkers are engaged in activity protected by the Act. Accordingly, an employer may not discharge or threaten to discharge an employee who honors a picket line. *American Transportation Service*, 310 NLRB 294, 296 (1993), quoting *ABS Co.*, 269 NLRB 774, 774–775 (1984) (discharge); *Sunnyside Home Care Project*, 308 NLRB 346 (1992) (threat to discharge). On August 6, while the Respondent's employees and Local 370 picketed the Respondent's facility, the employees who were members of the Sheet Metal Workers Union refused to cross the picket line. Welsh threatened these employees with discharge if they did not return to work. This threat interfered with, restrained, and coerced the employees in the exercise of their Section 7 rights. Accordingly, by making this threat, the Respondent violated Section 8(a)(1).

2. Letter threatening discipline of employees who honor the picket line

An employer may not discipline or threaten to discipline employees who honor a picket line. *American Transportation Service*, supra. On August 6, while Local 370 was picketing the Respondent's facility, the Respondent delivered letters to its employees who were members of the Sheet Metal Workers Union. The letters threatened discipline against the employees if they did not report for work on August 7. The letters also imposed discipline on the employees by requiring them to return all company property on August 7, and threatening that if they did not, "proper authorities" would be notified. Thus, the threat of discipline was compounded with the threat of possible arrest. The threat and discipline set forth in the Respondent's August 6 letters interfere with the employees' Section 7 rights, and violate Section 8(a)(1) of the Act.

The Respondent claims that it engaged in these threatening and disciplinary actions because its employees had failed to comply with the call-in policy. The Respondent claims to have a call-in policy, although, again, this policy is not in writing. The call-in policy requires employees to notify the Respondent by 8 a.m. on any day they will be absent from work. The policy assists the Respondent in scheduling work and work projects.

The Respondent's factual argument fails to address the facts involved in its threats and discipline. First, the Respondent threatened the employees with discipline without regard to the call-in policy. ("Your failure to report for work on August 7th and work on August 7th, 2003 and each day thereafter . . . will result in Center Service imposing discipline on you.") Thus, the Respondent threatened to impose discipline on its employees solely for their honoring the picket line in the future, not for failing to comply with the call-in policy in the past. Second, the discipline that was imposed—return of company property—was more severe than the Respondent's usual response to a violation of the call-in policy, which was a warning (that is, no discipline). (Tr. 487–488.) Accordingly, the Respondent's factual defense to the present charge is rejected.

The Respondent's violation of Section 8(a)(1) is established, as set forth above, by Board precedent dealing with discipline and threats of discipline because of Section 7 activities. However, if the Respondent's interests in maintaining efficient assignments of work to its employees were to be balanced against the employees' Section 7 rights in refusing to cross the picket line, see *Business Services by Manpower*, 272 NLRB 827 (1984), enf. denied 784 F.2d 442 (2d Cir. 1986), the conclusion would be the same. The Respondent offered no evidence concerning the extent to which, if at all, its business was disrupted by the employees' failure to comply with the call-in policy. Moreover, the picket line was set up at 6:45 a.m., and the employees who refused to cross the picket line congregated next to the company's trucks in the parking lot across the street from Eagleson's office. The Respondent not only knew the identity of the employees who were refusing to cross the picket line, Welsh even took their picture. Thus, the information that the Respondent would obtain from the observance of its call-in policy was timely obtained in any event. Accordingly, this case is "plainly distinguishable" from *Business Services by Manpower*, supra. See *Western Stress, Inc.*, 290 NLRB 678, 679 (1988).

The Respondent violated Section 8(a)(1) by disciplining and threatening to discipline its employees for their protected activity in honoring a picket line at the Respondent's facility.

3. Surveillance

Absent proper justification, photographing employees engaged in protected concerted activities constitutes unlawful surveillance because it has a tendency to intimidate employees, implant the fear of future reprisals, and interfere with the exercise of Section 7 rights. Photographing in the mere belief that something might happen is not a sufficient justification. *F. W. Woolworth Co.*, 310 NLRB 1197 (1993); *Waco, Inc.*, 273 NLRB 746 (1984). The employer's motive when it surveils employees' protected activities is not an essential element of an 8(a)(1) violation. The test is whether the conduct interferes with the free exercise of Section 7 rights. *American Freightways Co.*, 124 NLRB 146, 147 (1959). The Board has determined that an employer interferes with its employees' free exercise of their Section 7 rights when it takes photographs of them on a picket line. Thus, surveillance may be unlawful without regard to whether the employees know of it. *Starbrite Furniture Corp.*, 226 NLRB 507 (1976).

The Respondent argues that Lockhart was the only employee who picketed, and he was on layoff at the time of the picketing. Without regard to the relevance of this factual argument, it is inaccurate. Ruddy picketed, together with other employees such as Mike Oliver, Dan Parker, and an employee identified only as Kevin.

The Respondent also argues that there was no need for it to take pictures of the employees on the picket line. Presumably, this argument is preliminary to another factual argument, viz., that the employees on the picket line were not actually intimidated by having management take their photographs on the picket line. But a defense to a charge of unlawful surveillance by the taking of photographs of picketers is not whether the employer had no need to take the photographs, but rather, whether the employer can prove that it had a need to take the photographs. Moreover, the violation of 8(a)(1) does not depend on the employees' subjective reaction to the unlawful activity. E.g., *Sunnyside Home Care Project, Inc.*, 308 NLRB 346 fn. 1 (1992).

The Respondent also argues that Welsh started taking photographs after he saw Ranger videotape some of the activity. "[T]he Board requires an employer engaging in such photographing or videotaping to demonstrate that it had a reasonable basis to have anticipated misconduct by the employees. '[T]he Board may properly require a company to provide a solid justification for its resort to anticipatory photographing.'" *National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997), quoting *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 701 (7th Cir 1976). The Respondent presented no evidence that it anticipated picket line misconduct. Accordingly, the Respondent's argument that Welsh started taking photographs after he saw Ranger videotape some of the picket line activity does not address, much less meet, the Board's imposing justification test.

The Respondent admits that it took photographs of the employees in the picket line at its facility. The picket line was composed, inter alia, of the Respondent's employees. The Respondent has failed to prove a justification for the photographing. Accordingly, the Respondent has violated Section 8(a)(1) of the Act.

4. Threat to fire employees of the Sheet Metal Workers Union if Local 370 were selected to represent the Respondent's plumbing employees

The threat of job loss is one of the most flagrant examples of interference with Section 7 rights. *Sheraton Hotel Waterbury*, 312 NLRB 304 (1993). On August 7, Eagleson, in the presence of his service manager, told Ruddy, the Sheet Metal Workers union steward, "If we let the Plumbers come in here, it is going to take three or four of your men's positions. Who would [you] like to get rid of here?" This threat of job loss if the plumbers were to select Local 370 as their representative interferes with the Section 7 rights of all the Respondent's employees, and violates Section 8(a)(1) of the Act.

The Respondent contends that Eagleson's statement to Ruddy constituted Eagleson's opinion of the effect that Local 370's collective-bargaining agreement would have on the sheet metal workers, and that Section 8(c) of the Act protects Eagleson in voicing his opinion. This contention is rejected. If an employer makes a prediction of the effects unionization will have on the Company, "the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Eagleson's threat that three or four sheet metal workers would lose their jobs does not meet this test.

The bargaining unit that Local 370 seeks to represent consists of two plumbers. The unit does not consist of any sheet metal workers. Local 370 did not solicit any workers to sign cards other than the Respondent's two plumbers. When Ranger met with Eagleson on August 4, Ranger told Eagleson that the plumbers had signed cards and presented these two cards to

Eagleson. Eagleson was also aware of the employees Local 370 represented because he was formerly a member of Local 370. Notwithstanding Ranger's August 5 letter, which contained an inadvertent reference to the Respondent's HVAC employees, Eagleson was not confused about the specific employees of the Respondent that Local 370 sought to represent.

Eagleson also claims that Local 370's collective-bargaining agreement seeks to represent sheet metal workers. Again, however, this contention is belied by Local 370's organizing efforts and its demand for recognition. Moreover, the Respondent presented no evidence of any jurisdictional disputes between the sheet metal workers and the plumbers, nor evidence of the plumbers union claiming jobs performed by the sheet metal workers, either at the Respondent or any other company. In short, the Respondent presented no evidence of objective facts supporting "demonstrably probable consequences" upon which Eagleson's threat was made.

The cases cited by the Respondent to support its contention that Eagleson's threat to Ruddy did not unlawfully interfere with the employees' Section 7 rights are inapposite. In *Airstream, Inc. v. NLRB*, 877 F.2d 1291 (6th Cir. 1989), the employer told its employees about a new job awareness program soon after the union filed an election petition. The court found that the employer's communications concerning the awareness program did not unlawfully interfere with the employees' Section 7 rights. However, the lawfulness of communications concerning a benefit from an employer during an organizing drive is inapposite to the question in the present case concerning the lawfulness of the employer's threat of the loss of jobs should the union be successful in an organizing drive.

Of course, the general proposition must be kept in mind: "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *NLRB v. Gissel Packing Co.*, supra at 618. However, the operative distinction between the present case and the cases relied on by the Respondent is that Eagleson threatened his employees with the loss of jobs if Local 370 were selected to represent the plumber employees, whereas none of the cases cited by the Respondent involved a threat of job loss resulting from protected activity.

Thus, in *Atlantic Forest Products*, 282 NLRB 855 (1987), the Board found that speeches made by the employer's managers before an election did not threaten plant closure and the loss of benefits in violation of Section 8(a)(1). A prominent fact relied on by the Board in reaching its conclusion was that none of the speeches contained a direct threat of the adverse consequences. In the present case, however, there was a direct threat: "If we let the Plumbers come in here, it is going to take three or four of your men's positions." Accordingly, *Atlantic Forest Products* is not controlling and does not modify the well-established principle that the threat of job loss because of organizing activity interferes with Section 7 rights.

In *Blue Grass Industries*, 287 NLRB 274 (1987), the Board found that a manager's reference to a separate company's plant, that had shut down after a strike, did not constitute a threat to close if the employees selected the union. There was no direct threat of adverse consequences as there was in the present case. In *Salvation Army Residence*, 293 NLRB 944 (1989), the Board found that the employer's statement that the union belonged to the Mafia was protected by Section 8(c) as a privileged expression of opinion. In *Sears, Roebuck & Co.*, 305 NLRB 193 (1991), the Board found the employer's statement that the union might send someone out to break employees' legs to collect dues, although flip and intemperate, was an expression of personal opinion protected by Section 8(c). The Board noted that to constitute a threat the threatened action must be within the party's power to carry out, whereas the alleged threatened action by the employer was not ascribed to the employer, but to the union. The Respondent cites *Safety Kleen Oil Services*, 308 NLRB 208 (1992) (miscited as "Troxel Co."), but this case lends no support to the Respondent's position. In *NLRB v. Pentre Electric, Inc.*, 998 F.2d 363 (6th Cir. 1993), the employer stated that, based on the company's customer base, it would lose customers if the union were selected; however, the employer explained that the company would still prosper. The court noted that "[t]he record is simply devoid of any evidence that [the employer] suggested that Pentre might close its doors." Id. at 370. Similarly, none of the remaining cases cited by the Respondent, *Beverly Enterprises*, 310 NLRB 222 (1993); *Hampton Inn*, 309 NLRB 942 (1992); and *Flexsteel Industries*, 311 NLRB 257 (1993), involved direct threats of job loss or adverse consequences. Unlike these cases, the present case involves a direct threat by the employer that three or four jobs would be lost if the union, Local 370, were selected as the plumbers' representative.

The Respondent argues herein that Eagleson did not make a threat that three or four jobs would be lost if Local 370 were selected to represent the plumbers. This factual argument may explain the Respondent's reliance on inapposite cases that did not involve such a threat. Nevertheless, Ruddy was a credible witness, and his testimony regarding his meeting with Eagleson has been credited. Moreover, it is apparent that Eagleson intended to provoke a clash between the Sheet Metal Workers Union and Local 370, and his threat to Ruddy is consistent with that intent.

In summary, the Respondent has failed to present objective facts to support the demonstrably probable consequence, beyond the Respondent's control, to justify or support its threat that three or four jobs would be lost. Eagleson's threat that such jobs would be lost if Local 370 were selected to represent the Respondent's plumbers is a threat that is not protected by Section 8(c). For all of the foregoing reasons, Eagleson's threat violates Section 8(a)(1).

5. Eagleson's threat of adverse employment actions and solicitation of grievances during his discussion with Rose

a. Threat

In his discussion with Rose in mid-August, Eagleson told Rose that, after Local 370's previous two unsuccessful organizing drives, he "eventually got rid of the [useless] sons of bitches." Rose then asked Eagleson if he considered Rose to be useless, and Eagleson replied, "No, I hear you're a good one." The General Counsel argues that the implicit, unlawful threat in

Eagleson's first statement was that Eagleson would also get rid of Rose for his current support of Local 370. I disagree.

The question is, considering all the circumstances of Eagleson's statement, did it reasonably tend to interfere with Rose's Section 7 rights. *Sunnyside Home Care Project, Inc.*, 308 NLRB 346 (1992). The resolution of this question is difficult and is close. The statement does not contain a direct threat. On the other hand, the statement does demonstrate, in a clear and arguably threatening manner, Eagleson's antiunion animus. The statement links, with no justification or explanation, employees who support a union with useless "sons of bitches." Nevertheless, Eagleson assured Rose, immediately after this statement and in response to Rose's question, that he did not consider Rose to be useless. (Of course, the question by Rose is evidence that he felt threatened by the statement. However, the immediate reassurance by Eagleson would have eliminated Rose's concern.) In the absence of other evidence to show that the statement could reasonably be understood as a threat to discharge Rose for his union support, I conclude the General Counsel has not sustained his burden of proof that the statement constituted an unlawful threat. Accordingly, I will recommend that this charge be dismissed.

b. Solicitation of grievances

An employer interferes with the Section 7 rights of employees by soliciting employee grievances and promising to remedy them during a union organizational campaign. *Safety Kleen Oil Services*, supra at 209. In addition, when an employer institutes a new practice of soliciting employee grievances during a union organizational campaign, "there is a compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary." *Embassy Suites Resort*, 309 NLRB 1313, 1316 (1992), citing *Reliance Electric Co.*, 191 NLRB 44, 46 (1971).

At the end of the mid-August meeting, Eagleson told Rose, "If you have any problems with this company, I'm the President . . . you need to discuss these with me." This was a change from the previous policy of the Respondent for handling employee complaints. The previous policy required the employee to initially go to the immediate supervisor before going to Eagleson. Eagleson's solicitation of complaints or problems from Rose through a new procedure interfered with Rose's Section 7 rights. *House of Raeford Farms*, 308 NLRB 568, 569 (1992) ("It is well established, however, that an employer cannot rely on past practice to justify solicitation of employee grievances if the employer significantly alters its past manner and methods of solicitation during the union campaign.") Accordingly, the Respondent violated Section 8(a)(1) of the Act through Eagleson's unlawful solicitation of complaints from Rose in mid-August.

6. Prohibition against wearing shirts with union insignia

The right to wear union insignia at work has long been recognized. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). In the absence of special circumstances, a restriction on the wearing of union buttons or insignia constitutes a violation of Section 8(a)(1). *Virginia Electric & Power Co.*, 260 NLRB 408 (1982). Mere contact with customers or other persons is not a special circumstance. Id.

When Kristie Eagleson directed Rose to remove his union shirt, she told him that she did not want the contractor to think that the Respondent was paying union wage. However, the Respondent has failed to establish the reasonableness, much less the probability, of such an inference by a contractor or anyone else. Moreover, even if a contractor were to make such an inference, the Respondent failed to show how this inference would be detrimental in any way. Indeed, it seems just as likely to generate a favorable reaction as an unfavorable one, but it is not necessary to speculate because the Respondent has failed to offer any proof on the matter.

For the same reason, it is not necessary to decide whether the Respondent's desire to have contractors believe that it does not pay union scale constitutes a "special circumstance" exempting the Respondent's alleged clothing restriction from the general right of employees to wear union insignia recognized in *Republic Aviation*. See *NLRB v. Harrah's Club*, 337 F.2d 177 (9th Cir. 1964); *United Parcel Service*, 195 NLRB 441 (1972). However, it should be noted that, especially in light of there being no requirement to wear uniforms and the Respondent's allowance of many other logos on employees' work T-shirts, this case does not involve a claim of presenting to contractors or to the public an image of neatly uniformed workers. See *United Parcel Service*, supra.

The Respondent argues that the violation, if any, was de minimus. Supporting this argument is the fact that Rose had intended to remove his union shirt before starting work. Nevertheless, this violation is more than a mere technicality. Rose was allegedly directed to remove his union shirt in accordance with the Respondent's policy, yet the Respondent has not yet rescinded or modified that policy. Moreover, this violation was one of several violations committed by the Respondent after Local 370 told Eagleson and showed Eagleson that all his plumbing employees had signed authorization cards. The Respondent's de minimus contention is rejected.

The Respondent claims that it has had a policy for many years prohibiting the wearing of clothing that has religious, political, offensive sayings, or offensive pictures. However, the Respondent has not explained how a shirt that displays a union insignia fits within one of these prohibited categories. A shirt bearing only a union's insignia does not contain religious, political, or offensive sayings or offensive pictures. Thus, either Rose's union shirt did not violate the Respondent's work clothing policy, leading to the inference that the policy was unlawfully enforced against Rose because he had recently joined Local 370 in the midst of an organizing campaign. Or, Rose's union shirt did violate the Respondent's work clothing policy, as the Respondent claims, leading to the conclusion that the policy and the enforcement of the policy violate the Act. In either event, the Respondent's direction to Rose to remove his union shirt interfered with his Section 7 rights, and violated Section 8(a)(1).

7. Interrogation

Questions concerning union sympathies in the context of a job application interview are inherently coercive, and are viola-

tive of Section 8(a)(1), even when the interviewee is subsequently hired. *Rochester Cadet Cleaners,* 205 NLRB 773 (1973).

When Lawrence reported to the Respondent's in late August for a job interview, he first met with Welsh and was then brought to Eagleson's office. Eagleson asked Lawrence how he felt about unions. Lawrence replied that there were pros and cons, an answer he felt Eagleson wanted to hear. Eagleson's question is inherently coercive and violates Section 8(a)(1).

Moreover, if all the circumstances of the interrogation of Lawrence were considered, the result would not change. The test of whether an unlawful interrogation has occurred is whether, under all the circumstances, the alleged interrogation reasonably tends to restrain, coerce, or interfere with the employees in the exercise of rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In making this determination, all of the surrounding circumstances must be considered. Either the words themselves or the context in which they are used must suggest an element of coercion or interference. Id. Relevant circumstances include the time and place of the interrogation, the method used, the personnel involved, the nature of the information sought, the known position of the employer, whether the employee was given assurances that there would be no reprisals, whether a valid purpose for the interrogation was communicated to the employee, the truthfulness of the employee's response, and whether the person being questioned is an open union adherent. *Performance Friction Corp.,* 335 NLRB 1117 (2001), citing *Bourne v. NLRB,* 332 F.2d 47 (2d Cir. 1964); *Rossmore House,* supra; *Sunnyvale Medical Clinic,* 277 NLRB 1217 (1985).

The place of Eagleson's interrogation of Lawrence was Eagleson's office. Eagleson is the Respondent's president and owner. No valid purpose was communicated to Lawrence. There is no evidence of whether Lawrence knew Eagleson's feelings about unions, although Eagleson did say to Lawrence that if he wanted to join the Sheet Metal Workers Union, Eagleson would help. Of course, Lawrence was applying for a plumbing position and would not be a member of the sheet metal workers bargaining unit. Lawrence was given no assurances that there would be no reprisals, and Lawrence was not an open union adherent. Lawrence did not say whether his answer was truthful, but truthfulness was not Lawrence's concern. His only concern was to give Eagleson an answer he felt Eagleson wanted.

Under all the circumstances, the factors weigh in favor of a conclusion that Eagleson's questioning Lawrence as to how he felt about unions was coercive. Indeed, the circumstances of Eagleson's interrogation of Lawrence about Lawrence's union sympathies were inherently coercive. Accordingly, Eagleson's interrogation of Lawrence violated Section 8(a)(1) of the Act.

B. Section 8(a)(1) and (3)

1. The union members who applied for the advertised plumber opening

To establish a discriminatory refusal-to-hire in violation of Section 8(a)(3) of the Act, the General Counsel must prove the following: (1) the Respondent was hiring or had concrete plans to hire; (2) the applicants had experience or training relevant to the announced requirements of the position for hire or the requirements were applied as a pretext for discrimination; and (3) antiunion animus contributed to the decision not to hire the applicants. *FES*, 331 NLRB 9, 12 (2000). Once this is established, the burden shifts to the Respondent to show that it would not have hired the applicants even in the absence of their union affiliation. "If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity." Id.

The Respondent does not expressly concede, but nor does it dispute, that the General Counsel has satisfied the above three elements establishing a violation of Section 8(a)(3).[12] Rather, the Respondent argues that it would have refused to hire the union applicants without regard to their union affiliation. Accordingly, it is only necessary to briefly consider the three elements of the General Counsel's prima facie case.

Element 1. On August 17, the date of the Respondent's advertisement in the Flint Journal, the Respondent had concrete plans to hire at least one journeyman plumber. This is shown by the Respondent's advertisement, which prominently listed an opening for a journeyman plumber. Moreover, the Respondent did hire two journeymen plumbers in October (although the need to hire two, rather than one, plumbers may have arisen after the Respondent discharged Rose in September.)[13] The only qualification listed in the advertisement was a state (journeyman) license. *Element 2*. On August 18, seven qualified, journeymen plumbers applied for the available, journeymen plumber position(s) at the Respondent (consisting of the eight applicants, less the application of Young, who the General Counsel did not prove was a journeyman plumber). On August 19, four qualified, journeymen plumbers applied for the available, journeymen plumber position(s) (consisting of the five applicants, less the application of Wheeler, who the General Counsel did not prove was a journeyman plumber). On October 2, one qualified, journeymen plumbers applied for the available, journeymen plumber position(s) at the Respondent (consisting of the three applicants, less the application of Nelson, who the General Counsel did not prove was a journeyman

[12] Eagleson testified that he is not sure whether he needed plumbers on the date the advertisement appeared in the newspaper. Nevertheless, the Respondent did not assert this as a reason why he did not hire the union applicants. Moreover, whether or not Eagleson is presently sure he needed plumbers when the advertisement appeared, the fact remains that he advertised for a plumber on that date and spent $382.92 doing so.

[13] On August 17, the Respondent also had concrete plans to hire two plumber's helpers or apprentices, which is proven by the hiring of Lawrence in late August and Crosno in October. The hiring of two plumber's apprentices corroborates the determination that the Respondent had concrete plans to hire at least one journeyman plumber because, under State law, an apprentice is required to work with a licensed plumber. Therefore, two apprentices would be available to work with the Respondent's expected complement of two journeymen plumbers.

plumber, and the application of Gallant who was only available for part-time work). All of these 12 applicants were members of Local 370 and they all met the single, publicly announced requirement for the position—a State license. See *GM Electrics*, 323 NLRB 125, 128 fn. 13 (1997), cited in *FES*, supra at 12. *Element 3*. The Respondent knew the applicants were union members, and it does not argue otherwise. The Respondent's antiunion animus is established by all the facts set forth herein, and especially Eagleson's statement to Ranger that he would never sign an agreement with Local 370 and that he would go out of business before he would do so, as well as Eagleson's statement to Rose in which he called union members useless "sons of bitches."

The Respondent argues that it refused to hire the union applicants for various, nondiscriminatory reasons, and these alleged reasons are incorporated, in a shotgun approach, in the Respondent's answer to the complaint in this proceeding. For example, the Respondent asserts that 10 applicants (Cahill, Connor, McDermitt, Slattery, Morris, Steco, Young, Herriman, Mobilio, and Wheeler) were not considered because their applications were not filled out in the Respondent's building. However, there was no such requirement or condition when these applicants submitted their applications, and the Respondent did not tell the applicants of any such requirement. Moreover, there is no evidence that any other applications, much less the applications of Blasdell, Liddell, and Crosno, were completed or were required to be completed in the Respondent's building.

The Respondent claims that certain applications (Cahill, Connor, McDermitt, and Slattery) were not considered because the applicants did not answer or did not follow instructions in answering the questions in the application relating to general knowledge. However, Blasdell, Lawrence, and Crosno also did not answer the general knowledge questionnaire. Moreover, Liddell failed to answer many of the questions in the questionnaire, and answered the questionnaire in the same, supposedly wrong, way as Cahill, Connor, McDermitt, and Slattery.[14] In addition, Rose, who was hired in January 2003, completed his application in the same, supposedly wrong and disqualifying, manner.

The Respondent claims that certain applicants (Cahill, Connor, McDermitt, Slattery, Steco, Morris, Young, Herriman, Wheeler, and Nelson) failed to state in their applications that they had residential, as opposed to commercial, plumbing experience. First, no such requirement or preference was listed in the Respondent's advertisement for the position. Second, the Respondent's application does not ask the applicant to differentiate between or to highlight residential and commercial plumbing experience. Third, every applicant from Local 370 listed experience on his application with a plumbing contractor who performed residential as well as commercial plumbing.

The Respondent claims that the applications of Backlund, Herriman, and Wise were not considered because their applications stated that they were currently working, and the Respondent (allegedly) does not hire plumbers who are currently working. (GC Exh. 1(t); Tr. 339.) However, the applications of Rose, Lawrence, and Liddell state that they were then currently working, and the Respondent did not reveal any hesitancy in hiring them. (GC Exh. 23, 34; R Exh. 10.) The Respondent also claims that the applications of several union members were not considered because references were not provided in the applications. However, Blasdell and Liddell also failed to list references in their applications.

The Respondent argues that it hired Blasdell and Liddell as journeymen plumbers because they were former employees and their work had been satisfactory. However, Slattery had also worked for the Respondent in the past, and there was no evidence that the Respondent was dissatisfied with his work. Moreover, the Respondent's argument does not answer why it had previously—long before it hired Blasdell and Liddell—refused to hire any of the union applicants. The Local 370 plumbers applied for the Respondent's advertised plumbing position the day after the advertisement appeared in the newspaper. The Respondent failed to contact any of the union applicants, and it waited almost 2 months before soliciting Blasdell and hiring Blasdell and Liddell. It is reasonable to infer that the Respondent wanted and needed the plumbers for which it advertised when the advertisement appeared. There was no apparent need to delay approximately 2 months in hiring plumbers, especially after so many qualified plumbers had applied for the job the day after the advertisement appeared. Moreover, if the Respondent had a practice or policy or preference of hiring plumbers that it had previously employed, there was no need for it to incur the expense of the advertisement ($382.92) or to spend the time in distributing, receiving, processing, and reviewing other applications. In fact, the Respondent's interest in hiring plumbers it formerly employed is a pretext that only arose after the Respondent received the applications from the qualified plumbers who were members of Local 370, the union that was seeking to represent the Respondent's plumbing employees.

Steco and Cahill are master plumbers, whereas Blasdell and Liddell are journeymen plumbers. This is affirmative proof the superior qualifications of Steco and Cahill. In addition, the experience of the 12 union plumbers ranged from a minimum of 7 years (Connor and Solarz) to almost 50 years (Steco). The union plumbers had experience in both commercial and residential plumbing. Steco and Eagleson attended the same apprentice plumbing classes together in 1965 and have been friends since that time.

The Respondent's explanations for its refusal to hire any of the Local 370 applicants are not credible, do not withstand factual analysis, and are belied by its actions in hiring Blasdell and Liddell. In short, the Respondent's reasons for its refusal to hire, or to even interview or contact, any of the 12 qualified plumbers who applied for the advertised position are pretextual. Accordingly, the inference of wrongful motive established by the General Counsel remains intact. *Limestone Apparel Corp.*, 255 NLRB 722 (1981). The Respondent violated Section 8(a)(3) and (1) of the Act in its refusal to hire any of the union applicants for its advertised plumber position.

[14] These applicants, as well as Liddell, placed check marks next to listed plumbing categories in which they had experience. The questionnaire instructed the applicant to state "yes or no."

2. Discharge of Rose

Under the test set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), when the employer is alleged to have violated Section 8(a)(3) in discharging an employee, the General Counsel has the burden of proving by a preponderance of the evidence that antiunion sentiment was a motivating factor in the discharge. To meet this burden, the General Counsel must offer credible evidence of union or other protected activity, employer knowledge of this activity, and the existence of antiunion animus. *Briar Crest Nursing Home*, 333 NLRB 935 (2001). Once such unlawful motivation is shown, the burden shifts to the employer to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. Id.; *Wright Line*, supra. If the employer's stated motive is found to be false, the circumstances may warrant an inference that the true motive is an unlawful one. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Nevertheless, the employer's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it. *Merrilat Industries*, 307 NLRB 1301, 1303 (1992). The ultimate burden of proving discrimination always remains with the General Counsel. *Wright Line*, supra.

The evidence presented to satisfy the General Counsel's initial burden must be analyzed separately from the evidence presented in the Respondent's defense. *Pace Industrial*, 320 NLRB 661 (1996), enfd. 118 F.3d 585 (8th Cir. 1997). Nevertheless, an employer's stated reasons for an adverse employment action against an employee can be considered as a part of the General Counsel's initial burden, and if those reasons are pretextual, they can support an inference that the employer had an unlawful motive. *Black Entertainment Television*, 324 NLRB 1161 (1997). The entire record may be examined to ascertain whether the adverse employment action was motivated by protected activity. Thus, in determining whether the evidence presented has satisfied the General Counsel's initial burden, the evidence is not limited to the evidence introduced by the General Counsel, but can also include the reasons advanced by the Respondent for the discharge and any additional evidence offered at the hearing by the Respondent. *American Gardens Management Co.*, supra at fn.5; *Williams Contracting*, 309 NLRB 433 (1992).

Rose engaged in protected or union activity by signing an authorization card for Local 370. The Respondent knew of his protected activity because Rose's signed card was shown to and read by Eagleson on August 4. In addition, Rose later wore a union shirt to work that Kristie Eagleson directed him to remove. Antiunion animus is shown, inter alia, by Eagleson's statement to Ranger that he would never sign an agreement with the Union and by Eagleson's derogatory comment to Rose about union members. The Respondent's commission of 8(a)(1) violations also demonstrates animus. *Greyston Bakery*, 327 NLRB 433 (1999). Accordingly, the General Counsel has established that Rose's discharge was motivated by an unlawful purpose prohibited by Section 8(a)(3).

In defense, the Respondent argues that its discharge of Rose was not discriminatory because it did not "discharge" Rose. Rather, the Respondent claims that it simply refused to allow Rose to rescind his alleged voluntary resignation. This argument is based on facts that have not been found in this case and that have been specifically rejected. Accordingly, the Respondent's defense is rejected.

Notwithstanding, even if its factual argument were accepted, the Respondent's defense does not prove enough because if Rose had voluntarily resigned, the question remains, what was the Respondent's motivation for refusing to allow Rose to rescind his resignation. See *Merrow Machine Co.*, 337 NLRB 421 fn. 1 (2002). Rose's use of his truck in going to the Union's offices on his way home from his job in Clarkston would not justify the Respondent's action. This is seen from the Respondent's initial decision to take back Rose's truck, rather than discharge him, in imposing discipline for Rose's unauthorized use of the truck. Moreover, the Respondent did not discharge other employees when they engaged in similar conduct.

The Respondent claims that, on September 25, Welsh told Rose that the Respondent would not allow Rose to rescind his resignation because of performance problems Rose had in a job in Williamston about 1 week previously. Rose denies that Welsh told him of any performance problems, and Rose is a more credible witness. In any event, the Respondent's claim is itself not credible. Rose had worked for the Respondent since January. The only job that Welsh could identify where Rose allegedly had a performance problem was the Williamston job, and this job was done within about 1 week of the day Rose was discharged. Moreover, if performance was actually a problem in Rose's employment, it would likely have been documented or mentioned to Rose while he was employed. But it was not. The evidence in this case, especially when considered with the Respondent's antiunion animus, compels the conclusion that the issue of a performance problem is an issue the Respondent contrived after Rose was discharged.

The pretextual and mendacious nature of the Respondent's explanation for its termination of Rose is also seen in Welsh's statement to Rose that he (Welsh) knew Rose was not happy working for the Respondent. Rose had never said this to Welsh or Eagleson, and he had done nothing to substantiate this contrived claim. Rather, Welsh was seeking Rose's concurrence so that Rose's imminent discharge would seem less harsh, or even consistent with Rose's wishes. Pretext is also seen in the charade instigated by Welsh and Eagleson regarding Rose's alleged resignation. Rose had not told Welsh that he quit. Rather, Welsh and Eagleson, knowing they wanted to discharge Rose, but lacking a justifiable reason for doing so, pretended Rose had told Welsh that he quit. Then, when Rose came to work on Monday, September 29, and knowing nothing of Welsh's and Eagleson's contrivance, he was surprised to hear Welsh talk about his resignation. Although Rose protested that he had never resigned, Welsh continued the charade and told Rose that his resignation was accepted. In any event, Welsh's statement to Rose does not alter the substance or the nature of the Respondent's action, which was the discharge of Rose.

Because the reasons advanced by the Respondent for its discharge of Rose are false and a pretext for its actual motive in

taking that action, the Respondent necessarily did not rely on those reasons in taking its action. Accordingly, there is no need to further address these reasons because a finding of pretext "leav[es] intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.,* 255 NLRB 722 (1981). The Respondent's discharge of Rose violated Section 8(a)(3) and (1) of the Act.

C. Gissel Bargaining Order

An employer may be directed to bargain with a union that has not been certified by the Board in two categories of cases. The first category comprises "'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices." *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 613–614 (1969). The second category (category II) includes "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes," and where at one point the union had majority support in the bargaining unit.... If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue." Id. at 614–615.

"Certain violations have been regularly regarded by the Board and the courts as highly coercive. These are the so-called 'hallmark' violations and their presence will support the issuance of a bargaining order unless some significant mitigating circumstance exists." *NLRB v. Jamaica Towing Co.,* 632 F.2d 208, 212 (2d Cir. 1980). The discharge of an employee because of union activity is such a hallmark violation and "is one of the most flagrant means by which an employer can hope to dissuade employees from selecting a bargaining representative because no event can have more crippling consequences to the exercise of Section 7 rights than the loss of work." *Mid-East Consolidation Warehouse,* 247 NLRB 552, 560 (1980).

The lasting effect of an employer's unfair labor practices is heightened when the bargaining unit is small. As the Board noted in *River West Development,* 311 NLRB 591 fn. 1 (1993), "Particularly in a small unit, the impact of discharging one-third of the unit [one of three unit employees was discharged] has a greater effect and is likely to chill Section 7 rights in the entire unit." The chilling effect of the Respondent's discharge of Rose in the present case is greater than in *River West Development* because Rose represented 50 percent of the employees in the unit.

The coerciveness and lasting effect of the employer's actions is also magnified when high management officials commit the unfair labor practices. *Debbie Reynolds Hotel,* 332 NLRB 466 (2000). In the present case, the Respondent's plumbing manager/sales manager, the Respondent's president and owner, and the owner's daughter committed the unfair labor practices. Thus, the Respondent's highest management complement and entire ownership undertook and participated in unfair labor practices that demonstrated the Respondent's attitude toward the union and toward organizing efforts on behalf of the union. Such actions have a "tendency to undermine majority strength and impede the election process." *Cassis Management Corp.,* 323 NLRB 456, 460 (1997).

Although Rose is entitled to reinstatement and backpay, these remedies would not erase the coercive effect of the Respondent's conduct. In light of the small size of the bargaining unit, the unit employees, whether they constitute one or more employees, will likely know about his discharge and the underlying message. *River West Development,* supra. Moreover, Rose would not likely risk another period of unemployment "by engaging in further attempts to improve [his] working conditions, in the absence of a bargaining order." *Cassis Management Corp,* supra. The ownership and management of the Respondent remains the same as when Rose was unlawfully discharged, which "can serve only to reinforce in the minds of the employees the lingering effects of the Respondent's violations." *State Materials, Inc.,* 328 NLRB 1317 (1999).

The Respondent's unfair labor practices other than its hallmark violation of discharging a union supporter also contribute to the coercive and durable effects of its conduct. Thus, the Respondent's coercive interrogation of an applicant for a plumber's position regarding his feelings about unions and the Respondent's threat to discharge and discipline employees for honoring a picket line are actions that the employees are likely to remember.

The possibility of erasing the effects of the Respondent's unfair labor practices by applying traditional remedies and conducting a fair election is slight. In addition, a bargaining order is necessary to protect the free expression of employee sentiment as evidenced by the authorization cards. Accordingly, a bargaining order is warranted under category II of the *Gissel* standard.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by threatening to discipline and discharge its employees for honoring a picket line at its facility; by unlawfully photographing its employees who were engaged in picketing; by threatening to discharge employees if the Union were selected to represent its plumbing employees; by unlawfully soliciting complaints from its employees and changing the manner in which complaints are handled during the Union's organizing drive; by unlawfully prohibiting the wearing of shirts with union insignia; and by unlawfully interrogating a job applicant concerning his viewpoint on unions.

4. The Respondent violated Section 8(a)(1) and (3) of the Act by unlawfully refusing to hire and to consider for hire the 12 union applicants for the position of journeyman plumber.

5. The Respondent violated Section 8(a)(1) and (3) of the Act by unlawfully discharging Wayne Rose.

6. The following employees of the Respondent constitute a unit appropriate for bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time journeymen plumbers, plumber apprentices, and plumber helpers engaged in the fab-

rication, installation, and service of plumbing equipment employed by Respondent at its facility located at 4040 E. Bristol Road, Burton, Michigan; but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, and all employees currently included in the bargaining unit represented by Sheet Metal Workers International Union, Local Union No. 7.

7. At all times since August 4, 2003, and continuing to the present date, the Union has been the exclusive representative of all the employees within the appropriate unit for purposes of collective bargaining.

8. By engaging in the above-described violations of Section 8(a)(1) and (3), the Respondent has undermined the majority strength of the Union and has impeded the election processes.

9. The unfair labor practices found herein are sufficiently pervasive, and have the tendency to undermine the Union's majority strength and to impede the election processes, as to warrant a remedial order requiring the Respondent to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Respondent's employees in the above-described appropriate unit.

10. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent has engaged in substantial and pervasive unfair labor practices calculated to destroy the Union's majority status, that traditional remedies for such unfair labor practices are unlikely to eliminate their lingering and coercive effects, and that the chances of holding a fair election are slight, I shall recommend that the Respondent be required to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate unit.

Having found that the Respondent unlawfully refused to hire one of the applicants for the available journeyman plumber position for which the Respondent advertised in the Flint Journal on August 17, 2003, it is ordered that the Respondent shall offer one of the applicants, listed below, immediate employment in that position, and that such applicant be made whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987):

> Maurice Cahill, Jermaine Connor, Gerald Cox, David McDermitt, Michael Morris, Dennis Slattery, Jack Steco, Eric Backlund, Michael Herriman, Scott Mobilio, William Wise, and Chester Solarz.

Having found that the Respondent unlawfully discharged Wayne Rose, I shall order that the Respondent offer him reinstatement and make him whole for any loss of earnings and other benefits in accordance with *F. W. Woolworth Co.*, supra, plus interest in accordance with *New Horizons for the Retarded*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Center Construction Company, Inc. d/b/a Center Service System Division, Burton, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to consider for hire, and refusing to hire, job applicants on the basis of their union affiliation or other protected activities.

(b) Discharging or otherwise discriminating against any employee on the basis of the employee's union affiliation or other protected activity.

(c) Threatening to discipline or to discharge its employees for honoring a picket line at its facility.

(d) Threatening to discharge its employees if its employees select United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO (the Union) to represent them.

(e) Photographing its employees who are engaged in protected activities.

(f) Soliciting complaints from its employees or changing the manner in which complaints are handled while a union is conducting an organization drive.

(g) Prohibiting its employees from wearing shirts with union insignia.

(h) Interrogating applicants for employment concerning their viewpoints on unions.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time journeymen plumbers, plumber apprentices, and plumber helpers engaged in the fabrication, installation, and service of plumbing equipment employed by Respondent at its facility located at 4040 E. Bristol Road, Burton, Michigan; but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, and all employees currently included in the bargaining unit represented by Sheet Metal Workers International Union, Local Union No. 7.

(b) Within 14 days from the date of this Order, the Respondent shall offer immediate employment to one of the discrimi-

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

natees from the following list without prejudice to the discriminatee's seniority or any other rights or privileges he would have enjoyed had the Respondent hired him when he applied. If the position for which this discriminatee should have been hired no longer exists, the Respondent shall offer him immediate employment in a substantially equivalent position without prejudice to his seniority or any other rights or privileges he would have enjoyed had the Respondent hired him when he applied.

> Maurice Cahill, Jermaine Connor, Gerald Cox, David McDermitt, Michael Morris, Dennis Slattery, Jack Steco, Eric Backlund, Michael Herriman, Scott Mobilio, William Wise, and Chester Solarz.

(c) Make the selected discriminatee whole for any loss of earnings and other benefits suffered as a result of the discrimination against him as set forth in the remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire any of the 12 discriminatees set forth in paragraph (a) above, and within 3 days thereafter notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

(e) Within 14 days from the date of this Order, offer Wayne Rose full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(f) Make Wayne Rose whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Burton, Michigan copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 4, 2003.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 21, 2004

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire or fail and refuse to consider for hire job applicants on the basis of their union affiliation or other protected activities.

WE WILL NOT discharge or otherwise discriminate against any employee on the basis of the employee's union affiliation or other protected activity.

WE WILL NOT threaten to discipline or discharge any employee for honoring a picket line at our facility.

WE WILL NOT threaten to discharge employees if they select United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO (the Union) to represent them.

WE WILL NOT unlawfully photograph employees who are engaged in picketing.

WE WILL NOT solicit complaints from employees or change the manner in which complaints are handled while a union is conducting an organization drive at our facility.

WE WILL NOT prohibit employees from wearing shirts with union insignia.

WE WILL NOT interrogate applicants for employment concerning their viewpoints on unions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for or employees in the bargaining unit.

WE WILL, within 14 days from the date of the Board's Order, offer Wayne Rose full reinstatement to his former job or, if that

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Wayne Rose whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Wayne Rose, and WE WILL , within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's Order, offer one of the 12 discriminatees listed below full instatement to the journeyman plumber position to which that person applied in response to our advertisement in the Flint Journal on August 17, 2003, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he would have enjoyed had he been hired when he applied.

Maurice Cahill, Jermaine Connor, Gerald Cox, David McDermitt, Michael Morris, Dennis Slattery, Jack Steco, Eric Backlund, Michael Herriman, Scott Mobilio, William Wise, and Chester Solarz.

WE WILL make the applicant who is offered the journeyman plumber position whole for any loss of earnings and other benefits resulting from our failure and refusal to hire him, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful refusal to hire any of the discriminatees, and WE WILL , within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them will not be used against them in any way.

CENTER CONSTRUCTION COMPANY, INC. D/B/A CENTER SERVICE SYSTEM DIVISION